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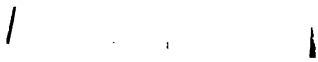
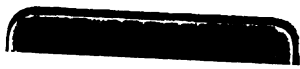


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MODERN REPORT

MODERN REPORTS;

O R,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

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VOLUME THE FIRST.



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AND  
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VOLUME THE FIRST;

CONTAINING,

adjudged in the Courts of KING'S BENCH, COMMON PLEAS,  
EXCHEQUER, and CHANCERY, from the Restoration of CHARLES  
THE SECOND to the Thirtieth Year of CHARLES THE SECOND.

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THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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L O N D O N :

PRINTED FOR G. G. J. AND J. ROBINSON; E. AND R. BROOKE;  
J. BUTTERWORTH; OGILVY AND SPEARE; AND  
L. WHITE, DUBLIN.

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1793.



# ADVERTISEMENT

TO THE

## FIRST EDITION.

**T**HESE REPORTS, the first, except the LORD CHIEF JUSTICE VAUGHAN's Arguments, that have been yet printed of Cases adjudged since His Majesty's happy Restoration; though they are not published under the name of any eminent person, as some other spurious ones have been, to gain thereby a reputation, which in themselves they could not merit; were collected by a person of ability and judgment, and communicated to several of known learning in the law, who think them not inferior to many books of this nature which are admitted for authorities. A great and well-spread name may be requisite to render a book authentic, and to defend it from that common censure of which this age is become so very liberal; but its own worth is that only which can make it useful and instructive.

THE READER will find here several Cases (as well such as have been resolved upon our modern acts of parliament, as others relating to the common law)

## ADVERTISEMENT TO

which are *primæ impressiois*, and not to be found in any of the former volumes of the law ; and the pith and substance of divers arguments, as well as resolutions of the reverend Judges on many other weighty and difficult points.

See Mr. Justice  
Foster's obser-  
vation upon  
Strange's Re-  
ports.

AND, indeed, though in every case the main thing which it behoves us to know is, What THE JUDGES take and define to be law ; yet the short and concise way of reporting it, which is affected in some of our books, doth very scantily answer the true and proper end of reading them ; which is not only to know what is law, but upon what grounds and reasons it is adjudged so to be : otherwise THE STUDENT is many times at a loss and left in the dark ; especially where he finds other resolutions which seem to have a tendency to the contrary opinion.

- IN this respect, these REPORTS will appear to be more satisfactory and enlightening than many others : several of the Cases (especially those of the most important consideration) containing, in a brief and summary way, what hath been offered by the counsel *pro* and *con*, and the debates of the reverend Judges as well as their ultimate resolutions ; than which nothing can more contribute to the advantage of the studious reader, and to the settling and guidance of his judgment, not only in the point controverted, but likewise in other matters of law where the reason is the same. *Ubi eadem ratio, idem jus.*

As to the truth of these REPORTS, though the modesty of the gentleman who collected them hath prevailed

## THE FIRST EDITION.

vailed above the importunity of the bookseller, and he hath rather chosen to see his book than himself to gain the public acceptance and applause, whereby it hath lost some seeming advantage which the prefixing of his name would have undoubtedly given it ; yet the reader may rest assured, that no little care hath been taken to prevent any mistakes or misrepresentations ; the judgments having been examined, and the authorities here cited industriously compared with THE BOOKS out of which they were taken.



# ADVERTISEMENT

TO THE

PRESENT EDITION.

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THE last Edition of THE MODERN REPORTS was published about thirty years ago, in seven volumes folio, under the auspices of Mr. PICKERING's name; and, in the title-page, *it is said*, that *many thousands of new and proper* references had been added. To these seven volumes the industry of several later Reporters has added five more; but in the margins of these five volumes a very few solitary references only are to be found. The whole work contains, *at present*, a valuable collection of Select Cases in Law and Equity, from the Restoration of Charles the Second to the death of George the First; the merit of which, and their long admitted authority in the superior courts, are too well known to require observation.

The promised assistance of several respectable characters in the profession has excited the hope of amassing a sufficient collection of *unreported Cases*, to enable the proprietors to continue the work, by an additional volume, through the several chasms which have been left open by subsequent reporters, to the commencement of THE TERM REPORTS. But this hope, however rational and well founded it may now be, obviously depends  
upon

## ADVERTISEMENT TO

upon contingencies too precarious and remote, to render its final accomplishment certain or secure.

THE TWELVE VOLUMES, however, are at present out of print; and the public demand for them, operating on their scarcity, is gradually superinducing premiums upon their original value. This consideration, conjoined with the idea of introducing into the work the many judicial and parliamentary alterations which several of the points of law have undergone since its *first* publication, has suggested the idea of furnishing the profession with a new, and a more useful edition of this work.

THE TEXT of the last Edition, in the collocation of words, and in the punctuation of the sentences, is in several places very imperfect: It has therefore been carefully collated with that of the original impression, and the alterations marked between hooks, or noticed in the margin.

A variety of Cases, without any name to them, are frequently crowded together in so confused a heap, that, in the first seven volumes, the marginal references of one Case are not, at first sight, clearly discernible from those of another: this aggregation has been separated, and the respective Cases distinguished by the title "ANONYMOUS," except where, on comparing them with contemporary Reporters, the true and real name of the Case has been discovered.

A very imperfect and frequently erroneous abstract of the several points which the Cases contain, appears in the margin of the old editions; these therefore have been  
been

## THE PRESENT EDITION.

been entirely expunged, and a new epitome extracted to supply their places.

In the arguments of counsel, and sometimes in the decisions of the Court, the persons delivering their opinions are described by their TITLES instead of their NAMES, as *Mr. Attorney*, *Mr. Solicitor*, *The Chief Justice*, *The Court*, &c. leaving it uncertain who they were. To supply this defect, at the commencement of every Term the names of the several Judges of the court in which the question is debated, as well as those of THE ATTORNEY and SOLICITOR GENERAL of the time have been prefixed, in the same manner as in Sir JOHN STRANGE's Reports.

THE MARGINAL REFERENCES, as far as Mr. PICKERING's publication extends, are certainly very numerous; but the general complaint of the profession is, that many of them are either inapplicable, or made to books of doubtful authority. An attempt, however, to displace the labours of so eminent an editor would perhaps appear invidious and arrogant. The Marginal References as they stand in the first seven volumes have, therefore, been left untouched, except only those which, upon a very careful examination, appear to have no relation whatever to the subject they are designed to illustrate, and except altering the circumlocution with which some of them are expressed; as 1. *Mod. Cases in Law and Equity*—*Cases Temp. Mac.*—*Cases Temp. Qu. Ann.*—*Cases Temp. Will.* 3.—into the more apposite and laconic abbreviations of 8. *Mod.* 10. *Mod.* 11. *Mod.* and 12. *Mod.*—

THE NOTES which accompany such of the *Cases* as seemed to the Editor to require explanation, are placed separately at the bottom of each Case; and these Notes, perhaps,

## ADVERTISEMENT, &c.

perhaps, form the most important *novelty* of the present edition.

It is well known, that most of the Cases, especially in the first volumes of the work, are differently reported by many contemporary Reporters ; these several Reports of the same Case therefore have been compared with each other, and the material points in which they differ, and in which they agree, marked out, and accompanied by references to such Cases as appear to confirm or contradict the decision of the Court.

The alterations which the determinations of the Courts and the Acts of the Legislature have since made upon the Law of the Case, are also introduced ; and in order to render the NOTES more full and complete, a reference is made to such Cases as appear to have any analogy to the subject.

To those Volumes where the INDEXES are neither copious nor exact, new Indexes are subjoined, accompanied by a Table of the Cases reported.

P R E F A C E  
TO  
THE FIFTH EDITION  
OF  
*THE MODERN REPORTS.*

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**T**HE last Edition of *THE MODERN REPORTS* was published about thirty years ago, in seven volumes folio, under the auspices of Mr. PICKERING's name; and, in the title-page, it is said, that many thousands of new and proper references had been added. To those seven volumes the industry of several later Reporters has added five more; but in the margins of the additional volumes a very few solitary references only are to be found. The whole work, previous to the present edition, consisted of collections of Select Cases in Law and Equity, from the Restoration of CHARLES THE SECOND to the death of GEORGE THE FIRST; the merit of which, and their long admitted authority in the superior courts, are too well known to require observation.

The former edition having been a long time out of print, and the public demand for the work continuing to operate

## P R E F A C E   T O

on its scarcity, a very high premium was gradually superinduced upon the original value (*a*): this consideration, conjoined with the idea of introducing the many judicial and parliamentary alterations which several of the points of law have undergone since its *first* publication, has induced the Proprietors to furnish the Profession with a new edition.

THE TEXT of the last Edition, in the collocation of words, and in the punctuation of the sentences, is in several places very imperfect: It has therefore been carefully collated with that of the original impression, and such alterations made in the present Edition as appeared to be necessary.

A variety of Cases, without any name to them, are, in the former edition, frequently crowded together in so confused a heap, that, in the first seven volumes, the marginal references of one Case are not, at first sight, clearly discernible from those of another: this aggregation has been separated, and the respective Cases distinguished by the title "ANONYMOUS," except where, on comparing them with contemporary Reporters, the true and real names of the Cases have been discovered.

Very imperfect and frequently erroneous abstracts of the several points which the Cases contain, appear in the margins of the old editions; these therefore have been, in a great number of instances, entirely expunged, and other epitomes extracted to supply their places.

(*a*) The former Edition of this work, in twelve volumes folio, sold for Fourteen Pounds; the present Edition, including its additions, is only about half that price.

In

## THE FIFTH EDITION.

In the arguments of Counsel, and sometimes in the decisions of the Court, the persons delivering their opinions are described by their TITLES instead of their NAMES, as *Mr. Attorney, Mr. Solicitor, The Chief Justice, The Court, &c.* leaving it uncertain who they were. In the present Edition, therefore, the names of the several Judges of the Court in which the question was debated, as well as those of THE ATTORNEY and SOLICITOR GENERAL of the time, have been prefixed at the commencement of every Term, in the same manner as in Sir JOHN STRANGE'S Reports.

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THE NOTES and REFERENCES which accompany such of the *Cases* as seemed to the Editor to require explanation, are placed separately at the bottom of each Case; and no pains have been spared to render them accurate.

## P R E F A C E   T O

It is well known, that most of the Cases, especially in the first volumes of the work, are differently reported by many contemporary Reporters ; the several Reports of the same Case therefore have been compared with each other, and the material points in which they differ, and in which they agree, marked out, and accompanied by references to such Cases as appear to confirm or contradict the decision of the Court.

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The promised assistance of several respectable Characters in the Profession, induced the Editor to hope, when he first engaged in the undertaking, that he should be able to amass a sufficient collection of *Manuscript Cases* to continue the work, by an additional volume, through the several chasms which have been left open by subsequent Reporters, to the commencement of THE TERM REPORTS ; but this hope, to the extent in which he indulged it, has, for the present at least, been disappointed : He has, however, been enabled to introduce a great variety of *New Cases* from *Original Manuscripts* into the present edition.

IN THE SEVENTH VOLUME will be found a Collection of Cases argued and determined in the Courts of King's Bench, Common Pleas, and Chancery, from *Easter Term* in the sixth year of GEORGE THE SECOND to *Michaelmas Term* in the eighteenth year of GEORGE THE SECOND.

The

## THE FIFTH EDITION.

The Cases are *one hundred and fifty-five* in number (*a*), *sixty-seven* of which, namely, those printed in *Italics* in the subjoined catalogue, are not reported in any other book.

Part

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( <i>a</i> ) Maccarty v. Barrow,	Rex v. Refit,
Hearne v. Buthell,	<i>Rex v. Archbishop of Canterbury,</i>
Rex v. Mayor of Evesham,	Rex v. Ellams,
Gambier v. Wright,	Colonel Pitt's Case,
Rex v. Taylor,	<i>Colmer v. Clark,</i>
Rex v. Carter,	Tryon v. Carter,
Smith v. Boucher,	Rex v. Pritchard,
Thomas v. Bishop,	Rex v. Smith,
Brassey v. Dawson,	<i>Russen v. Coleby,</i>
Kent v. Kent,	Robinson v. Beilby,
<i>Gilmere v. Horton,</i>	<i>Hallett v. Lawton,</i>
May v. Osbourne,	Ashburnham v. Bradshaw,
<i>Webb v. Dwight,</i>	<i>Morse v. James,</i>
<i>Rex v. Hooker,</i>	<i>Shipman v. Thompson,</i>
<i>Rex v. Halford,</i>	Cockerill v. Armstrong,
Rex v. Pole,	<i>Drinkwater v. Quinill,</i>
Comber v. Hill,	<i>Davis v. Powell,</i>
Rex v. Griffin,	<i>Bayley v. Lloyd,</i>
Arthur v. Vanderplank,	<i>King v. King,</i>
<i>Bilson v. Hill,</i>	Eaton v. Southby,
<i>Rex v. Grosvenor,</i>	Pitt v. Evans,
Rex v. Mayor of Shrewsbury,	<i>Cambridge v. Lamb,</i>
<i>Cook v. Vivian,</i>	<i>Pain v. Womanfell,</i>
Rex v. Gibson,	Mathews v. Lee,
Day v. Serle,	<i>Pinder v. Smith,</i>
Wainwright v. Bagshaw,	<i>Rex v. Willis,</i>
Harris v. Reeley,	Olive v. Ingram,
Harris v. Burley,	Vaughan v. Brown,
Dobbs v. Passer,	Rex v. Gardner,
Gamage v. Watkins,	<i>Rex v. Edwards,</i>
Carey v. Hinton,	<i>Thrustout v. Grey,</i>
Devenish v. Mertins,	Rex v. Wyvill,
Lumley v. Palmer,	<i>Rex v. Harman,</i>
Rex v. Bishop of Litchfield,	<i>Sheriff of Hampshire v. Godfrey,</i>
Rex v. Bettelworth,	<i>Waring v. Bletchington,</i>
	<i>Colthurst</i>

## P R E F A C E T O

Part of them appear, from the manuscript, to have been taken by a Mr. WRIGHT; the remainder are certainly the

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*Colthurst v. Colthurst,*  
*Marriot v. Thompson,*  
*Grigg's Case,*  
*Down v. Rowell,*  
*Preston v. Funnell,*  
*Tapner v. Murlett,*  
*Creek v. Pitcham,*  
*Anonymous,*  
*Bosworth v. Whiteman,*  
*Selmon v. Courtenay,*  
*Gurnett v. Wood,*  
*Lushington v. Dose,*  
*Nelson v. Bael,*  
*Rex v. Howard,*  
*Rex v. Whaley,*  
*Rex v. Greenwood,*  
*Rex v. Pocock,*  
*Rex v. Bettelworth,*  
*Walton v. Jordan,*  
*Rex v. Munoes,*  
*Hafwell v. Shallee,*  
*Ford's Case,*  
*Rex v. Bigaman,*  
*Rex v. Morgan,*  
*Warden v. Rous,*  
*Shuttleworth v. Pilkington,*  
*Talbot v. Hubble,*  
*Roe v. Roe,*  
*Boyer v. Bampton,*  
*Heathcoat v. Goffling,*  
*Rex v. Nance,*  
*Bartlett v. Gawler,*  
*Johnston v. Wilson,*  
*Carver v. James,*  
*Bradford v. Brien,*

*Peachy v. Osbaldiston,*  
*Rex v. Dr. Bland,*  
*Marlow v. Forbes,*  
*Vernon v. Jefferies,*  
*Elliston v. Camys,*  
*Martin v. Jenkins,*  
*Dormer v. Parkhouse,*  
*Rex v. Mayor of Weymouth,*  
*Jones v. Gegg,*  
*Dent v. Coates,*  
*Rex v. O'Brien,*  
*Morgan v. Griffith,*  
*Rex v. Seymour,*  
*Rex v. Evindon,*  
*Portland v. Wynns,*  
*Rouse v. Patterfen,*  
*Rex v. Sparrow,*  
*Rex v. Crofts,*  
*Rex v. Jenour,*  
*Rex v. Harman,*  
*Smith v. Huggins,*  
*Rex v. Jones,*  
*Walker v. Kerney,*  
*Barnsley v. Baldwyn,*  
*Hamilton v. Atherley,*  
*Thompson v. Slizer,*  
*Smith v. Scarffe,*  
*Wilder v. Hendy,*  
*Dent v. Coates,*  
*Hayfman v. Moon,*  
*Godman v. Morley,*  
*Oates v. Jackson,*  
*Cheston v. Crawley,*  
*Fisher v. Kitchenman,*  
*Goodridge v. Goodridge,*

*Dabbie*

## THE FIFTH EDITION.

the production of LUKE BENNE, Esq. an eminent Barrister at Law of that period.

In THE NINTH VOLUME will be found an additional Collection of Cases in the Court of Chancery during the time of LORD HARDWICKE, from *Michaelmas Term* in the tenth year of GEORGE THE SECOND, to *Trinity Term* in the twenty-eighth of GEORGE THE SECOND. These Cases (a) fill two hundred and eighty-three pages; are

*ninety*

*Dabble v. Elstol,*  
*Duckworth v. Tunstall,*  
*Griffin v. Fawson,*  
*Ratcliffe v. Goodchap,*  
*Bosworth v. Budgen,*  
*Read v. Vaughan,*  
*Cary v. Jefferson,*  
*Plumb v. Marson,*

*Pilgrim v. Kinders,*  
*Atkinson v. Setree,*  
*Milbourne v. Read,*  
*George v. Kinch,*  
*Mallock v. Eastly,*  
*Hall v. Douglas,*  
*Wynne v. Wynne.*

(a) *Evitt v. Williams,*  
*Garbut v. Wilson,*  
*Sheldon v. Sheldon,*  
*Boughton v. Boughton,*  
*Cheefseman v. Partridge,*  
*Graydon v. Hickes,*  
*Says v. Price,*  
*Serresby v. Hollins,*  
*Attorney General v. Lord*  
*Gower,*  
*Pemfret v. Murray,*  
*Ex parte Gumbleton,*  
*Crop v. Norton,*  
*Hodsell v. Buffell,*  
*Newstead v. Johnston,*  
*Sterling v. Penlington,*  
*Gower v. Grovenor,*  
*Harvey v. Harvey,*

*Salt v. Chambers,*  
*Robinson v. Cox,*  
*Man v. Parkinson,*  
*Gibson v. Stiles,*  
*Chapman v. Turner,*  
*Partridge v. Partridge,*  
*Northey v. Northey,*  
*Kennedy v. Ackland,*  
*Mayor of York v. Pilkington,*  
*Lockwood v. Ewer,*  
*Patman v. Seymour,*  
*Bagshaw v. Newton,*  
*Brizick v. Manners,*  
*Attorney General v. Landerfield,*  
*Gomer v. Grabam,*  
*Rogers v. Downs,*  
*Jackson v. Butler,*  
*Wilkinson v. Sterne,*

*Williams*

## P R E F A C E   T O

*ninety* in number, and *fifty-two* now for the first time reported; they were all of them, except the last thirteen, printed from a collection of Manuscript Cases preserved in the library of the late SAMUEL SALTE, Esq. of the Inner Temple; they appear to have been taken with great accuracy, and many of them bear the author's name, which is printed as it appeared in the original manuscript.

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<i>Williams v. Williams,</i>	<i>Attorney General v. Baliol College,</i>
<i>Bell v. Howard,</i>	<i>Bedford v. Gilson,</i>
<i>Woodcroft v. Kynaston,</i>	<i>Ex parte Turner,</i>
<i>Weston v. Bowes,</i>	<i>Selwyn v. Honeywood,</i>
<i>Ward v. Hensel,</i>	<i>Wilkinson v. Sterne,</i>
<i>Bennet v. Vade,</i>	<i>Wingfield v. Newton,</i>
<i>Richards v. Baker,</i>	<i>Pipon v. Pipon,</i>
<i>Richards v. Sims,</i>	<i>Jobson v. Petty,</i>
<i>—— v. Fitzgerald,</i>	<i>Meadburn v. Isdal,</i>
<i>Thornhil v. Evans,</i>	<i>Skip v. Edwards,</i>
<i>Horner v. Bendloes,</i>	<i>Wilshaw v. Smith,</i>
<i>Smith v. Wyatt,</i>	<i>Dillon v. Green,</i>
<i>Clerk v. Perryam,</i>	<i>Walsh v. Patterson,</i>
<i>Hall v. Carter,</i>	<i>Furnwise v. Crew,</i>
<i>Charitable Corporation v. Sut-</i>	<i>Giblet v. Read,</i>
<i>ton,</i>	<i>Jones v. Legg,</i>
<i>Ex parte Phelps,</i>	<i>Lloyd v. Manby,</i>
<i>Stanhope v. Cope,</i>	<i>Gwyn v. Hook,</i>
<i>Stringer v. New,</i>	<i>Parsons v. Parsons,</i>
<i>Montgomery v. Attorney General,</i>	<i>Ex parte Winchester,</i>
<i>Sergison v. Sealey,</i>	<i>Bailey v. Wilson,</i>
<i>Ineson v. Moulston,</i>	<i>Bland v. Bland,</i>
<i>Steward v. East India Company,</i>	<i>Ellinor v. Garton,</i>
<i>Montgomery v. Attorney Ge-</i>	<i>Paget v. Gee,</i>
<i>neral,</i>	<i>Ritson v. Lord Middleton,</i>
<i>Sergison v. Sealey,</i>	<i>Wilkes v. Holmes,</i>
<i>Elwys v. Thompson,</i>	<i>Adams v. Danvers,</i>
<i>Patterson v. Tush,</i>	<i>Bowles v. More.</i>
<i>Le Noy v. Duchés of Athol,</i>	

The

## THE FIFTH EDITION.

The last thirteen Cases in this volume were kindly sent to the Editor, through the hands of one of the Proprietors of the work, by CHARLES BUTLER, Esq. of *Lincoln's Inn*; a gentleman whose liberality is co-extensive with his learning, and to whom the Profession is already much indebted for his valuable labours in the modern editions of *COKE UPON LITTLETON*.

TO THE ELEVENTH VOLUME is added a Collection of Select Cases in the King's Bench, from *Trinity Term* in the fourth year of GEORGE THE FIRST, to *Michaelmas Term* in the fourth year of GEORGE THE SECOND. They are *one hundred and thirty-six* in number, *seventy-eight* of which are not reported in any other work (a). These Cases

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(a) *Gough v. Simpson*,  
*Rex v. Hales Owen*,  
*Paine's Case*,  
*Rex v. Walderham*,  
*Eyres v. Hiasie*,  
*Trott v. Gagg*,  
*Arnold v. Meredith*,  
*Gough v. Crear*,  
*Penn v. Aiston*,  
*Thomas's Case*,  
*Jeffs v. Bolton*,  
*Clerk's Case*,  
*Rex v. Vaux*,  
*Anonymous*,  
*Heinsworth v. Wilson*,  
*Clerk v. Birch*,  
*Rex v. Saunders*,  
*Rex v. Bridgewater*,  
*Rex v. Burcleer*,  
*Rex v. Gribble*,  
*Rex v. Pocklington*,  
*Adorman v. Cutting*,  
*Rex v. Adams*,

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*Beacon v. Peck*,  
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Rex

## THE FIFTH EDITION.

at Law, and were presented to the Editor by WILLIAM BLEAMIRE, Esq. a gentleman who is now employing his active talents and independent mind to the advantage of the Public, in discharging the important and useful duties of a Magistrate, for the preservation of *the peace* and in the support of *the police* of this great and populous metropolis,

To this Edition therefore have been added *three hundred and eighty-one Cases*, of which *one hundred and thirty-seven* have never before appeared in print. The greater number of them appear to possess an extraordinary degree of merit; the statement of the facts, the arguments of Counsel, and the judgments of Court being extremely full, and bearing every intrinsic mark of correctness and authenticity, more especially those which are inserted in the Seventh and the Ninth Volumes. The Manuscripts of all of them have been preserved with every possible care, and are now in the possession of the Publisher, open to inspection.

THE INDEXES to the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eleventh Volumes are entirely new, and those of the remaining Volumes have been carefully corrected.

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THE

## PREFACE TO THE FIFTH EDITION.

**THE NAMES OF THE CASES** to all the Volumes, which in the former edition were very incorrect, are entirely new.

The Editor has thus endeavoured to render the work more useful to the Profession; but in an undertaking pregnant with so many difficulties, and in which such variety of labour was required, it would be in vain to hope that many defects necessary to have been noticed may not have escaped his observation.

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# MICHAELMAS TERM,

The Twenty-First of Charles the Second.

IN

The King's Bench.

Saturday, 23 October, 1669.

Sir John Kelynge, *Knt. Chief Justice,*

Sir John Twifden, *Knt.*

Sir William Moreton, *Knt.*

Sir Richard Rainsford, *Knt.*

} *Justices.*

Sir Jeoffry Palmer, *Knt. Attorney General.*

Sir Heneage Finch, *Knt. Solicitor General.*

• [ 1 ]

• Mynn's Case.

Case 1.

**M**YNN, an attorney, entered a judgment, by co-  
lour of a warrant of attorney, of another Term than was  
expressed in the warrant.—THE COURT consulting with  
the Secondary about it, he said, that if the warrant be to  
appear and enter judgment as of this Term, *or at any time after*, the  
attorney may enter judgment at any time during his life. But in  
the case in question the warrant of attorney had not these words,  
“*or at any time after* :” wherefore The Secondary was ordered to  
confider the charge of the party grieved, in order to his repara-  
tion; which, THE COURT said, concluded him from bringing his  
action on the case.

At what time  
judgment may  
be entered on a  
warrant of at-  
torney.

10. Mod. 1. 44  
43. 263.  
1. Vent. 310.  
Stra. 718. 1247.  
Ld. Raym. 849.  
1. Will. 258.

If the warrant be *special or conditional*,  
the entry of the judgment must be ac-  
cording to the terms mentioned in it.  
Salk. 400. 1. Vent. 113. 1. Sid. 222.  
Barnes Notes, 37. 2. Black. 780. But  
if the warrant be *general*, judgment may  
be entered upon it at any time within

the first four Terms. 1. Crompt. Praet.  
315. If it be above a *year* old, then  
permission must be first obtained from  
the Court on affidavit. Barnes Notes,  
3d edit. 36. 38. 50. 256. 1. Crompt.  
Praet. 310. 5. Com. Dig. “Pleader”  
(Y 2.). 1. Term Rep. 80.

VOL. I.

B

Memorandum.

## Michaelmas Term, 21. Car. 2. In B. R.

### Cafe 2.

If a *babeas corpus* be returnable in Michaelmas or Easter Terms, the defendant is

**THE SECONDARY** said, that in *Trinity* and *Hilary Terms* they could not compel the party in a *babeas corpus* to plead and go to trial the same Term; but that in *Michaelmas* and *Easter Terms* they could.

not entitled to an *imparlance*. 7. Mod. 56. 117. Ld. Raym. 817.

This practice is now altered by a rule of the Court. 1. Salk. 668. 2. Salk. 669. 3. Salk. 670. 4. Salk. 671. 5. Salk. 672. 6. Salk. 673. 7. Salk. 674. 8. Salk. 675. 9. Salk. 676. 10. Salk. 677. 11. Salk. 678. 12. Salk. 679. 13. Salk. 680. 14. Salk. 681. 15. Salk. 682. 16. Salk. 683. 17. Salk. 684. 18. Salk. 685. 19. Salk. 686. 20. Salk. 687. 21. Salk. 688. 22. Salk. 689. 23. Salk. 690. 24. Salk. 691. 25. Salk. 692. 26. Salk. 693. 27. Salk. 694. 28. Salk. 695. 29. Salk. 696. 30. Salk. 697. 31. Salk. 698. 32. Salk. 699. 33. Salk. 700. 34. Salk. 701. 35. Salk. 702. 36. Salk. 703. 37. Salk. 704. 38. Salk. 705. 39. Salk. 706. 40. Salk. 707. 41. Salk. 708. 42. Salk. 709. 43. Salk. 710. 44. Salk. 711. 45. Salk. 712. 46. Salk. 713. 47. Salk. 714. 48. Salk. 715. 49. Salk. 716. 50. Salk. 717. 51. Salk. 718. 52. Salk. 719. 53. Salk. 720. 54. Salk. 721. 55. Salk. 722. 56. Salk. 723. 57. Salk. 724. 58. Salk. 725. 59. Salk. 726. 60. Salk. 727. 61. Salk. 728. 62. Salk. 729. 63. Salk. 730. 64. Salk. 731. 65. Salk. 732. 66. Salk. 733. 67. Salk. 734. 68. Salk. 735. 69. Salk. 736. 70. Salk. 737. 71. Salk. 738. 72. Salk. 739. 73. Salk. 740. 74. Salk. 741. 75. Salk. 742. 76. Salk. 743. 77. Salk. 744. 78. Salk. 745. 79. Salk. 746. 80. Salk. 747. 81. Salk. 748. 82. Salk. 749. 83. Salk. 750. 84. Salk. 751. 85. Salk. 752. 86. Salk. 753. 87. Salk. 754. 88. Salk. 755. 89. Salk. 756. 90. Salk. 757. 91. Salk. 758. 92. Salk. 759. 93. Salk. 760. 94. Salk. 761. 95. Salk. 762. 96. Salk. 763. 97. Salk. 764. 98. Salk. 765. 99. Salk. 766. 100. Salk. 767. 101. Salk. 768. 102. Salk. 769. 103. Salk. 770. 104. Salk. 771. 105. Salk. 772. 106. Salk. 773. 107. Salk. 774. 108. Salk. 775. 109. Salk. 776. 110. Salk. 777. 111. Salk. 778. 112. Salk. 779. 113. Salk. 780. 114. Salk. 781. 115. Salk. 782. 116. Salk. 783. 117. Salk. 784. 118. Salk. 785. 119. Salk. 786. 120. Salk. 787. 121. Salk. 788. 122. Salk. 789. 123. Salk. 790. 124. Salk. 791. 125. Salk. 792. 126. Salk. 793. 127. Salk. 794. 128. 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Salk. 857. 191. Salk. 858. 192. Salk. 859. 193. Salk. 860. 194. Salk. 861. 195. Salk. 862. 196. Salk. 863. 197. Salk. 864. 198. Salk. 865. 199. Salk. 866. 200. Salk. 867. 201. Salk. 868. 202. Salk. 869. 203. Salk. 870. 204. Salk. 871. 205. Salk. 872. 206. Salk. 873. 207. Salk. 874. 208. Salk. 875. 209. Salk. 876. 210. Salk. 877. 211. Salk. 878. 212. Salk. 879. 213. Salk. 880. 214. Salk. 881. 215. Salk. 882. 216. Salk. 883. 217. Salk. 884. 218. Salk. 885. 219. Salk. 886. 220. Salk. 887. 221. Salk. 888. 222. Salk. 889. 223. Salk. 890. 224. Salk. 891. 225. Salk. 892. 226. Salk. 893. 227. Salk. 894. 228. Salk. 895. 229. Salk. 896. 230. Salk. 897. 231. Salk. 898. 232. Salk. 899. 233. Salk. 900. 234. Salk. 901. 235. Salk. 902. 236. Salk. 903. 237. Salk. 904. 238. Salk. 905. 239. Salk. 906. 240. Salk. 907. 241. Salk. 908. 242. Salk. 909. 243. Salk. 910. 244. Salk. 911. 245. Salk. 912. 246. Salk. 913. 247. Salk. 914. 248. Salk. 915. 249. Salk. 916. 250. Salk. 917. 251. Salk. 918. 252. Salk. 919. 253. Salk. 920. 254. Salk. 921. 255. Salk. 922. 256. Salk. 923. 257. Salk. 924. 258. Salk. 925. 259. Salk. 926. 260. Salk. 927. 261. Salk. 928. 262. Salk. 929. 263. Salk. 930. 264. Salk. 931. 265. Salk. 932. 266. Salk. 933. 267. Salk. 934. 268. Salk. 935. 269. Salk. 936. 270. Salk. 937. 271. Salk. 938. 272. Salk. 939. 273. Salk. 940. 274. Salk. 941. 275. Salk. 942. 276. Salk. 943. 277. Salk. 944. 278. Salk. 945. 279. Salk. 946. 280. Salk. 947. 281. Salk. 948. 282. Salk. 949. 283. Salk. 950. 284. Salk. 951. 285. Salk. 952. 286. Salk. 953. 287. Salk. 954. 288. Salk. 955. 289. Salk. 956. 290. Salk. 957. 291. Salk. 958. 292. Salk. 959. 293. Salk. 960. 294. Salk. 961. 295. Salk. 962. 296. Salk. 963. 297. Salk. 964. 298. Salk. 965. 299. Salk. 966. 300. Salk. 967. 301. Salk. 968. 302. Salk. 969. 303. Salk. 970. 304. Salk. 971. 305. Salk. 972. 306. Salk. 973. 307. Salk. 974. 308. Salk. 975. 309. Salk. 976. 310. Salk. 977. 311. Salk. 978. 312. Salk. 979. 313. Salk. 980. 314. Salk. 981. 315. Salk. 982. 316. Salk. 983. 317. Salk. 984. 318. Salk. 985. 319. Salk. 986. 320. Salk. 987. 321. Salk. 988. 322. Salk. 989. 323. Salk. 990. 324. Salk. 991. 325. Salk. 992. 326. Salk. 993. 327. Salk. 994. 328. Salk. 995. 329. Salk. 996. 330. Salk. 997. 331. Salk. 998. 332. Salk. 999. 333. Salk. 1000.

### Memorandum.

### Cafe 3.

Excessive damages: no ground for a new trial. Raym. 77.

10. Mod. 102. 8. Mod. 197. 213. 12. Mod. 85. 127. Strange, 125. 1259. Barnes Notes, 3d edit. 129. 230. 318. 436. 445.

\* [ 2 ]

**NOTE**, The Court have a power in all cases of excessive damages to grant a new trial. 1. Term Rep. 277. In personal torts, however, and in all actions where it is the peculiar and strict province of the jury to estimate the extent of the injury, they will not disturb a verdict because the damages are ex-

cessive, except they appear to have been given from passion, partiality, or prejudice. 1. Burr. 609. Cowp. 230.— See also Salk. 647. Ld. Raym. 63. 1. Will. 61. 2. Will. 372. 405. 3. Will. 61. Burr. 2226. Doug. 314. 510. Sayer's Law of Damages, p. 210. to 238. 2. Term Rep. 166.

### Cafe 4.

Venue changed by the King before appearance.—

**AN AFFIDAVIT** for changing of a *venue* made before the party was arrested; and allowed. S. C. 1. Vent. 17. S. C. 1. Sid. 412. S. C. 2. Keb. 386. 2. Salk. 668.

But in the case of *common persons* it is now ordered, by rule Easter 24. Car. 2. that the defendant shall not move to change the *venue* in any action until his

appearance be entered. Loffit, 321. 217. Impey's Practice, 5th edit. 167. Wil. 245. Stra. 211. 858. Jay. 77. 207. Cqwp. 511. 51. 1. Term Rep. 635.

### Cafe 5.

No bail in battery.

**MOVED** in battery, for putting an arm out of joint, that the party might be held to special bail; but denied.—**TWISDEN, Justice.** Follow the course of the court. 6. Mod. 230. 2. Roll. 335. fol. 14. Inst. Leg. 20. 1. Lev. 39. 2. Ld. Raym. 767. Barnes Notes, 47. 55. 58. 78. Sid. 276. 307. Comb. 57. Salk. 101. 1. Bac. Abr. 209. 1. Black. Rep. 192.

### Cafe 6.

The sessions may discharge an apprentice from his master, and order a portion of the fee to be returned. Post.

**MR. SAUNDERS** moved to quash an order made by the justices of the peace for putting away an apprentice from his master, and ordering the master to give him so much money.—**KELYNGE, Chief Justice.** The statute of 5. Eliz. c. 4. §. 35 leaves this to their discretion. 287. 1. Saund. 313. 314. 1. Salk. 67. 68. 2. Salk. 490. 491. 2. Ld. Raym. 1410.

There are notes of this Cafe 1. Sid. 411. 2. Keb. 541. 592. and it is very fully reported 1. Saund. 313. The Court were unanimous, that the justices have a discretionary power either to inflict corporal punishment or to discharge a bad apprentice; but that where the complaint is against the master, they can only dissolve the indentures; and that the restoration

of the money is consequential to their jurisdiction to discharge. See the 20. Geo. 2. c. 29.—2. Salk. 68. Strange, 143. 663. 2. Ld. Raym. 1410. 5. Mod. 239. and Mr. Conft's Edition of Bott's Poor Laws, vol. I. page 503 to 519. where all the Cases upon this subject are collected.

Michaelmas Term; 21. Car. 2. In B. R.

Anonymous.

Cafe 7.

**A**N INDICTMENT was preferred in *Chester* for perjury committed in *London*; for which *KELYNGE*, *Chief Justice*, threatened to have the liberties of the *county palatine* seized, if they kept not within their bounds.

Franchise.  
Pott. 118.  
12. Mod. 535.  
2. Com. Dig.  
393, 394. 410.  
792. to 798.

and see *Rex v. Gough*, Dougl.

Goodwin against Harlow.

Cafe 8.

**E**RROR to reverse a judgment in *Colchester*; there being no appearance by the party, but judgment upon three defaults recorded. Reversed.—*TWISDEN*, *Justice*. If there be a judgment against three, you cannot take out execution against one or two (a).

Judgment reversed for want of an appearance entered.

1. Roll. 888.  
1. Vern. 213.

(a) 1. *Ld. Raym.* 244. *Comb.* 441. which the execution *must* be joint, and  
1. *Salk.* 312. 5. *Mod.* 338. *Carth.* where it *may* be several, *vide* *Crompt.*  
404. 3. *Danv. Ab.* 332. p. 6. *Show.* *Pract.* 347, 348.  
405. *Dougl.* 627. But for Cases in

Anonymous.

Cafe 9.

**T**WISDEN, *Justice*, upon a motion for a NEW TRIAL, said, that in his practice the heir, in an action of debt against him upon a bond of his ancestor, pleaded *riens per descens*; the plaintiff knew that the defendant had levied a fine, and at the trial it was produced: but because they had not a deed to lead the uses, it was urged that the use was to the conusor and his heirs, and so the heir in *by descens* (a); whereupon there was a verdict against him. And it being a just and due debt, they could never after get a *new trial* (b).

A fine without a deed to lead the uses, shall be taken to the use of the conusor and his heirs.—No new trial shall be granted where the verdict does substantial justice.

(a) By 29. Car. 2. c. 3. s. 10. & 11. if any *cestui que trust* leave a trust in fee simple to descend to his heir, it shall be taken to be assets *by descens*, and liable to execution for a debt of the ancestor in whosesoever hands such lands by descens shall come after the writ purchased: And by 3. & 4. Will. & Mary, c. 14. in all cases where any heir at law shall be liable to the debt of his ancestor, in respect of any lands descending to him, and shall convey them away before action brought, he shall be liable to the value of the lands so conveyed, &c. See post. 253. *Carth.* 245. 1. *Peer. Wms.* 294.

3. *Peer. Wms.* 399. 3. *Bac. Abr.* 26.  
1. *Eq. Abr.* 149. 5. *Mod.* 122. *Comb.* 344. 2. *Chan. Caf.* 175. 2. *Vern.* 62.  
*Dougl.* 45.

(b) See 12. *Mod.* 439. 11. *Mod.* 52. 111. 141. 206. *Fitzg.* 40. *Salk.* 653. 646. *Str.* 101. 899. 1238.  
*Ld. Raym.* 62. 514. 1. *Peer. Wms.* 212. 673. 2. *Peer. Wms.* 426. 564.  
*Burr.* 2257. *Cowp.* 37. The Cases of *Ashley v. Ashley*, and *Smith v. Huggins*, 2. *Strange*, 1142. *Edmonson v. Machell*, 2. *Term Rep.* 4; and *Wilkinson v. Payne*, 4. *Term Rep.* 468.

\* [ 3 ]

\* *Gostwicke against Mason.*

Cafe 10.

**D**EBT FOR RENT upon a lease for a year, and so from year to year, *quamdiu ambabus partibus placuerit*. There was a verdict for the plaintiff for two years rent.—*SAUNDERS* moved in arrestment of the continuance in possession is aided by the verdict.—*S. C.* 1. *Sid.* 423. *S. C.* 1. *Vent.* 41. *S. P.* 6. *Co.* 35. *Cro. Eliz.* 775. See also *Lutw.* 66. 2. *Danv.* 508. pl. 6. 10. *Mod.* 69, 70. 162. 12. *Mod.* 7. 1. *Ld. Raym.* 746. 2. *Str.* 776. *Salk.* 69, 70. 414. 3. *Bac. Abr.* 434. *Dougl.* 455. 1. *Term Rep.* 380. 3. *Term Rep.* 13. 349.

In debt upon a lease for three years rent, the want of an

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GOSTWICKE  
against  
MASON.

rest of judgment, that the plaintiff alledges indeed that the defendant entered and was possessed the first year, but mentions no entry as to the second.—TWISDEN, *Justice*. The jury have found the rent to be due for both years, and we will now intend that he was in possession all the time for which the rent is found to be due.

### Cafe 11.

### Bates against Kendal.

Teaching school  
without licence.

S. C. 1. Vent.  
41.

S. C. 2. Keb. 538.  
2. Hawk. 18. and 48.

**A** PROHIBITION was prayed to the ecclesiastical court at *Chester* to stay proceedings upon a libel against one *William Bates*, for teaching school without licence; but it was denied.

See the statutes 1. Jac. 1. c. 4. s. 9. and 19. Geo. 3. c. 44.

It appears by the report of this case in *Keeble*, that the prohibition was granted, because the object of the libel was to put him out of the school, when the patronage was not in the ordinary, but in the *founder*; in which case the ordinary can only *censure*, but not *expel*; nor can he libel for the penalty. *Carthew*,

484. 2. Lev. 222.—This jurisdiction extends only to *grammar-schools*. 1. *Peer*. Will. 20. 32.—See an argument but no determination upon this subject, *Salk*. 672. 12. Mod. 192.—And as to the bishop's duty in granting the licence, vide 2. Bar. 365. 428. 2. *Kel*. 287. pl. 218. and 367. and *Strange*, 1023.

### Cafe 12.

### Redman against Edolfe.

*Trinity Term, 21. Car. 2. Roll 799.*

The court will  
presume an original  
to be perfect  
until the  
contrary appears.

S. C. 1. Sid. 423.

S. C. 1. Saund.

**T**RESPASS and EJECTMENT by original in this court.—**SAUNDERS** moved in arrest of judgment, upon a fault in the original; for a bad original is not helped by verdict. But upon **MR. LIVESAY's** certifying that there was no original at all, the plaintiff had judgment, though in his declaration he recited the original.

317. S. C. 2. Keb. 544. 583. Cro. Jac. 108. 4. Mod. 246. Tidd's Pract. 222.

See also the statute 18. Eliz. c. 14. by which it is enacted, that no judgment shall, after verdict, be stayed or reversed for any default in form, or for the want of any original writ, &c. 5. Co. 37.

Barnes Notes, 3d edit. 14, &c. 1. *Ld*. Raym. 565. 2. *Ld*. Raym. 1058. 1066. *Stra*. 1211. 1. *Will*. 1. 2. *Will*. 147. 2. *Burr*. 1162. 4. *Burr*. 2448. *Cowp*. 841. *Dougl*. 62. 218. 1. *Term Rep*. 149.

### Cafe 13.

### Tuberville against Savage.

If a man lay his  
hand upon his  
sword and say,  
"If it were not  
affize-time, I  
would not  
take such  
language,"  
this is no assault.

S. C. 2. Keb. 545.  
S. C. 1. Vent.  
256.

2. Ro. Ab. 547.  
6. Mod. 149.

10. Mod. 187.

1. Lev. 282.

2. Bac. Ab. 154.

**A**CTION of assault, battery, and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not affize-time, I would not take such language from you."—THE QUESTION was, If that were an assault?—THE COURT agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and the intention as well as the act makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault.—In the principal case the plaintiff had judgment.

Gilb. Law of Evid. 256. 1. Com. Dig. 591. Bull. N. P. 15. 1. Hawk. P. C. 263.

Medlicot

## \* Medlicot against Joyner.

Case 14.

**EJECTMENT.** The plaintiff at the trial offered in evidence a copy of a deed that was burnt by the fire. The copy was taken by one *Mr. Gardner* of the *Temple*; who said, he did not examine it by the *original*, but that he writ it, and that it always lay by him as a *true copy*.—THE COURT agreed to have it read, the original deed being proved to be burnt.

When a deed is proved to be burnt, a copy of it is good evidence, though not examined with the original,

if understood to be a *true copy*.—S. C. 2. Keb. 546. Post. 94. 114. 266. 3. Keb. 477. 5. Mod. 211. 386. 6. Mod. 285. 248. 10. Co. 92. 2. Vern. 471. 591. 603. Abr. Eq. 228. 1. Str. 401. 526. See also 1. Atkins, 49. 3. Atkins, 214. Salk. 285. Bull. N. P. 228. 254. Gilbert's Law of Evidence, 97, 98. Dougl. 594. 3. Term Rep. 151. 3. Com. Dig. "Evidence" (B 4.). Ambler's Rep. 248. where it is said, that this was the first case where parole evidence was admitted of the contents of a deed.

## Anonymous.

Case 15.

**TWISDEN, Justice.** If a feoffee upon condition be disseised, and a fine be levied, and five years pass, and then the condition be broken, the feoffor may enter; for the *disseisor* held the estate subject to the condition; and so did the *conusee*, for he cannot be in of a better estate than the *conusor* himself was.

If a feoffee upon condition be disseised, the feoffor may enter on condition broken, although a fine and non-

claim have intervened.—Post. 217. Owen, 141. Co. Lit. 240. b. 1. Co. 124. 9. Co. 106. 10. Co. 98. Cro. Eliz. 919. Cro. Car. 577. Com. Rep. 547. Ld. Ray. 750, 782. Stra. 1128. 2. Atk. 631. 1. Peere Wms. 270. 520. 3. Peere Wms. 283. 368. See the Hargrave edition of Co. Lit. 239. note (1), and 332. note (1). Cowp. 701.

## Daw against Swayne.

Case 16.

**A N ACTION UPON THE CASE** was brought against one for suing the plaintiff in *placito debiti* for six hundred pounds, and falsely and maliciously affirming to the bailiff of *Westminster* that he did owe him six hundred pounds, whereby the bailiff insisted upon *extraordinary bail*, to his damages, &c. The defendant traverses, *ABSQUE HOC*, that he did falsely and maliciously affirm to the bailiff of *Westminster* that he did owe him so much.—*WINNINGTON* moved in arrest of judgment, that the action would not lie; but the plaintiff had judgment.

An action on the case lies for falsely and maliciously holding another to special bail.

S. C. 1. Sid. 424. S. C. 1. Lev. 275. S. C. 2. Keb. 546. Raym. 176.

**KELYNGE, Chief Justice.** If there had been no cause of action, an action upon the case would not lie, because he has a recompence by law; but here was a cause of action. If one should arrest you in an action of two thousand pounds to the intent that you should not find bail, and keep you from practice all this Term, and this is found to be falsely and maliciously, shall not you have an action for this?—*TWISDEN, Justice*, said, that he knew this to have been *SERJEANT ROLL*'s opinion,

1. Vent. 18. 1. Saund. 228. 1. Lev. 292. 3. Lev. 211. Hob. 267.

1. Salk. 14. 8. Mod. 227. 12. Mod. 228. 257. 273. 555. Fitzg. 43. 98. 10. Mod. 145.

**MORETON, Justice.** *Foxley's Case* (a) is, that if a man be outlawed in another county where he is not known, an action upon the case will lie: so an action lies against the sheriff, if reasonable bail be offered and refused.

149. 209. 217. Ld. Ray. 380. 603. Dougl. 153.

(a) 1. Roll. 103.

Cafe 17.

• Anonymous.

Bail and declaration.

**T**WISDEN, *Justice*. If *three men* bring an action, and the defendant put in bail at the suit of *four men*, they cannot declare; but if he had put in bail at the suit of *one man*, that *one* might declare against him.

Cafe 18.

Smith and Another against Irish.

If the plaintiff die between the day of nisi prius and the day in bank, the action shall abate.—*Sed quare.*

*Vide* Bynet v. Holden, post. 6.

S. C. 2. Kcb. 548. Cio. Car. 509.

1. Leon. 263. 2. Kcb. 54. 449. 477.

1. Kcb. 477. 3. Kcb. 160. 466. 4. Co. 39.

**J**UDGMENT was entered as of *Trinity Term* for the queen mother, and a writ of enquiry of damages was taken out returnable this Term, and she died in the vacation time.—**RESOLVED**, that the first was but an interlocutory judgment, and that the action was *abated* by her death.—**TWISDEN, Justice**. Some have questioned how you shall come to make the death of the party appear between *the verdict* and the *day in bank*; and I have known it offered by *affidavit*; by *suggestion* upon the roll; and by *motion*.

1. Sid. 131. 6. Mod. 142. 1. Mod. 6. 3. Kcb. 160. 466. 4. Co. 39. Hob. 129. Strange, 47. 1. Com. Dig. 56.

By 17. Car. 2. c. 8, in all actions the death of either party between the verdict and the judgment shall not be pleaded for error, so as such judgment be entered within two Terms after such verdict. See 1. Lev. 277. 1. Salk. 8. 2. Keh. 800. 2. Vern. 220.—And by 8. & 9. Will. 3. c. 11. s. 6. in all actions commenced in any court of record, if either plaintiff or defendant die after an interlocutory judgment, and before a final judgment obtained, and the action be such as might be originally maintained by or against the executors or administrators of such plaintiff or defendant, it shall not *abate* by reason of such death. See 3. Term Rep. 437.

Cafe 19.

The Cafe of Troy, an Attorney.

An information for extortion shall lie on the 3. Jac. 1. c. 7. against an attorney.

Co. Lit. 368. b. 2. Inst. 209.

3. Inst. 149. 4. Inst. 274.

**A**N INFORMATION of extortion against **TROY, an attorney**.—It was moved in arrest of judgment, that attornies are not within any of the statutes against extortion; and therefore the information concluded ill, the conclusion being, *contra formam statuti*.—**TWISDEN, Justice**. The statute of 3. Jac. 1. c. 7. is exprefs against attornies.—**KELYNGE, Chief Justice**. I think, as thus advised, that attornies are within all the statutes of extortion.

1. Hawk. P. C. 172. 317. 1. Salk. 86. See also 2. Geo. 2. c. 22. s. 23. Stra. 633.

A perial information against an attorney for extortion, in a cause which he was employed to prosecute, must expressly alledge in what court the defendant was impleaded.—S. C. 1. Sid. 434.

5. C. 2. Keh. 548. 1. Jones, 65. Noy, 76. 2. Roll. Ab. 32. 75. 266. 1. Roll. Ab. 16. 1. Roll. Rep. 323.

It was afterwards moved in arrest of judgment, **FIRST**, that the information was insufficient in the law; because **SIR THOMAS FANSHAW** informed, that *Mr. Tray*, being an attorney of the court of common pleas, did, at *Maidstone*, cause one *Collop* to be impleaded for 9s. 4d. debt, at the suit of one *Dudley Sillinger, &c.*; and this was *ad grave damnum* of *Collop, &c.*; but it is not expressed in what court he caused him to be impleaded.

8. Mod. 109. 338. 10. Mod. 41. 45. 263.

**SECONDLY,**

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SECONDLY, That which the defendant is charged with is not an offence; for he saith, that he did cause him to be impleaded, and received the money the same day; and perhaps he received the money after he had caused him to be impleaded.

THE CASE OF  
TROY, AN  
ATTORNEY.

THIRDLY, Then it is not sufficiently alledged, that he did *illicite* receive so much; and extortion ought to be particularly alledged.

Extortion must  
be specially  
alledged.  
Raym. 245.

FOURTHLY, There is not any statute that an attorney shall receive no more than his just fees. The profession of an attorney is at common law, and allowed by the statute of *Westminster* 1. c. 26.; and the \* statute of 3. Jac. 1. c. 7. does not extend to this matter. *Non constat* in this case, if what he received was for fees or no.

\* [ 6 ]

FIFTHLY, The suit for an offence against the statutes must be brought by the party, not by *Sir Thomas Fanshawe*.

KELYNCE, *Chief Justice*. If the party grieved will not sue for the penalty of treble damages given by that statute, yet the king may prosecute to turn him out of THE ROLL.

Cowp. 819.

TWISDEN, *Justice*. I doubt that; nor is it clear, whether an information will lie at all upon that statute, or not; for the statute does not speak of an information.

KELYNCE, *Chief Justice*. Whenever a statute makes a thing criminal, an information will lie upon that statute, though not given by express words.

2. Hawk. P. C.  
302. *notis*.  
1. Burr. Rep.  
545. 799.  
Cowp. 524-650.

2. Burr. 805. 834.

TWISDEN, *Justice*. It appears here, that this money was not received of his client, for he was against *Collop*; but he ought to shew in what court the impleading was; for otherwise it might be before The Mayor in his chamber. To which THE COURT agreed; so the information was quashed.

10. Co. 75. b.  
1. Salk. 374.  
Doug. 153.

Burnet against Holden, Executor of Greenhill.

Case 20.

THERE were two points in this case. FIRST, If the defendant die after the day of *nisi prius*, and before the day *in bank*, Whether the judgment shall be said to be given in the life of the defendant?

If a defendant  
die between the  
verdict and the  
day in bank,  
leaving a credi-

SECONDLY, Admitting that it shall, yet, Whether the executor shall have the advantage taken from him of retaining to satisfy his own debt?

tor his execu-  
tor, such execu-  
tor cannot set  
off his debt in a  
*scire facias* on  
the judgment.  
S. C. 2. Kebl.  
49. 559. 594.  
783. 800.  
S. C. 1. Lev.  
277.

To THE FIRST it was said, that the act of parliament 7. Car. 2. c. 8. only takes away a writ of error in such case; but there is no day *in bank* to plead (a).—It was ordered to stand in the paper; and, after argument, it was adjudged for the plaintiff.

1. C. Ray, 210. Ante, 5. 8. Salk. 8. 6. Mod. 142. 1. Vent. 235. 1. Term Rep. 389.  
1. Term Rep. 557.

(a) See the statute of 8. & 9. Will. 3. the parties between the interlocutory and final judgment shall not abate the suit, or be alledged for error.

Michaelmas Term, 21. Car. 2. In B. R.

Meller *against* Staples.

Case 21.

Easter Term, 21. Car. 2. Roll

A prescription by a corporation for common *sans nombre in gross* is good upon demurrer, without saying *levant* and *couchant*.

S. C. 2. Lev. 246.  
S. C. 2. Jo. 115.

\* [ 7 ]

S. C. 1. Saund. 343.

S. C. 2. Keb. 527. 550. 570.

S. C. 2. Show. 43. Post, 75.

Stiles, 428.  
1. Lev. 196.

2. Lev. 2.  
1. Sid. 313.

2. Sid. 87.  
Lutw. 431. 500.

2. Show. 30. 95.

1. Vent. 163. 383.

10. Mod. 53. 72.

12. Mod. 249.

1. Ld. Ray. 406. 558.

926. 2. Ld. Ray. 1188. 1230.

3. Bl. Com. 239.—(a) See Hobbsen v. Todd, 4. Term Rep. 71.

THE corporation of the town of *Derby* prescribe to have common without number *in gross*.

SAUNDERS. I conceive it may be by prescription. What a man may *grant* may be *prescribed* for; *Co. Lit.* 123. is express.

KELYNGE, *Chief Justice*. In a forest the king may grant common for sheep, but you cannot prescribe for it; and if you may prescribe for common without number *in gross*, then you may drive all the cattle in a fair to the common.

\* SAUNDERS. But the prescription is for their own cattle only.

TWISDEN, *Justice*. If you prescribe for common without number appurtenant to the land, you can put in no more cattle than what is proportionate to your land; for the law stints you in that case to a reasonable number (a). But if you prescribe for common without number *in gross*, what is it that sets any bounds in that case? There was a case in GLYNN's time of *Massfelden v. Stoneby*, where *Massfelden* prescribed for common without number without saying *levant et couchant*; and that being after a *verdict*, was held good; but if it had been upon a *demurrer*, it would have been otherwise.—LIVESAY said he was agent for him in the case.

1. Vent. 163. 383. 10. Mod. 53. 72. 12. Mod. 249. 1. Ld. Ray. 406. 558. 926. 2. Ld. Ray. 1188. 1230. 3. Bl. Com. 239.—(a) See Hobbsen v. Todd, 4. Term Rep. 71.

Case 22.

Bucknall *against* Swinnock.

To an *assumpsit* for money had and received, a plea that the plaintiff agreed that the defendant should pay it to a third person is bad.—S. C. 2. Keb. 550. Post 69.—(b) NOTE, Judgment was given for the plaintiff. See S. C. 2. Keb. 550.—See also 1. Salk 394.

INDEBITATUS ASSUMPSIT for money received to the plaintiff's use. The defendant pleads specially, that *post assumptionem prædictæ* there was an agreement between the plaintiff and defendant, that the defendant should pay the money to J. S. and he did pay it accordingly. The plaintiff demurs.—

JONES. This plea doth not only amount to the *general issue*, but is *repugnant* in itself.—It was put off to be argued (b).

—It was put off to be argued (b). NOTE, Judgment was given for the plaintiff. See S. C. 2. Keb. 550.—See also 1. Salk 394.

Case 23.

Hall *against* Wombell.

Debt will not lie on a judgment given by commissioners of excise.—Raym. 14. Jones, 29. Winch. 61. Godb. 354. 1. Roll. Abr. 599. Cro. Eliz. 186. 1. Will. 316. 1. Espinasse's Digest, 213.

THE question was, Whether an action of DEBT would lie upon a judgment given by the commissioners of excise, upon an information before them?—*Adjournatur*.

—It was put off to be argued (b). NOTE, Judgment was given for the plaintiff. See S. C. 2. Keb. 550.—See also 1. Salk 394.

Case 24.

Vaughan *against* Casewell.

In a *quod ei deferreat* for lands in *Merioneth*, the tenant cannot

A WRIT OF ERROR was brought to reverse a judgment given at the grand sessions in *Wales*, in a writ of *quod ei deferreat*.

vouch a vouchee in *Cornwall*; for being an *English county* the voucher cannot be had; and a demurrer to a plea to such illegal voucher, is, if adjourned, *peremptory* on the tenant.—S. C. 2. Saund. 327. S. C. 2. Keb. 553. 567. 574. 603. 619. 2. Co. 50. 2. Inst. 241. 367. 411. Cro. Car. 445.

## Michaelmas Term, 21. Car. 2. In B. R.

**SAUNDERS.** The point in law will be this, Whether a tenant's vouching a vouchee out of the line be peremptory and final, or that a *respondeas ouster* shall be awarded (a) ?

VAUGHAN  
against  
CASEWELL.

• [ 8 ]

\* **MR. JONES.** In an affise the tenant may vouch another named in the writ, as in the Year Book 9. *Hen. 5. pl. 14.*; and so also in *Plowden, 89. b.*; but a voucher cannot be of one not named in the writ (b), because it is *festinum remedium*. In *Wales* they never allow *foreign vouchers*, because they cannot bring them in. If there be a *counterplea* to a *voucher*, and that be adjudged in another Term, it is always peremptory; otherwise if it be determined the same Term (c).

(a) See the Year Books, 20. Aff. pl. 2. 11. *Hen. 4. pl. 23.* 26. *Hen. 6. pl. 40.* 8. *Hen. 7. pl. 7.* 10. *Hen. 8. pl. 22.* and 2. *Inst. 243.* but it is now inserted in the appendix to Mr. Ruffhead's edition of the statutes, vol. ix. page 3.

(b) This writ is given by the statute of RUTLAND, 12. *Edw. 1.* which was not formerly in print, 2. *Saund. 38.*; (c) The judgment given at the Grand Session in favour of the *demandant* was, after the assignment of this and seven other errors, affirmed. See S. C. 2. *Saund. 42.*

### Anonymous.

### Case 25.

**AN ACTION** of trover and conversion was brought against husband and wife, and the wife arrested.—*TWISDEN, Justice.* The wife must be discharged upon common bail. So it was done in *Lady Balinglaff's Case (d)*. And where it is said in *CROKE*, that the wife in such case shall be discharged, it is to be understood that she shall be discharged upon common bail.—So *LIVESAY* said the course was.

In an action against husband and wife, if the wife be arrested, she shall be discharged on common bail. S. C. 1. *Vent. 49.* *Cro. Jac. 445.* 2. *Str. 444.* Tidd's *Pract. 49.*

1. *Lev. 216.* 6. *Mod. 17.* 1. *Sid. 21.* 10. *Mod. 163.* 12. *Mod. 19. 89. 246.* 2. *Str. 1167.* 1237. 1272. 2. *Bar. 72.* 80. *Salk. 115.* 3. *Wilf. 124.* 2. *Bl. Rep. 720.*

(d) 1. *Vent. 64.*—And see the Case of *Edwards v. Rourke* and his wife, 1. *Term Rep. 486.* in point: but if the *coverture* be not clearly made out, the Court will not discharge a *feme covert* on motion in a summary way, *Pearson v. Mary Meadow*, 2. *Bl. Rep. 903.* but will put the party to plead the *coverture*; which plea must be in *abatement*, and not in *bar*. *Milner v. Milnes*, 3. *Ter. Rep. 627.* See also *Clerk v. Norris*, *H. Bl. Rep. C. B. 235.* and 1. *Wilf. 265.*

### Anonymous.

### Case 26.

**IT** was said to be the course of THE COURT, that if an attorney be sued time enough to give him two rules to plead within the Term, judgment may be given, otherwise not.

Practice on an attachment of privilege. Ante, 2.

*Sra. 77.* 8. *Mod. 192.* 12. *Mod. 112.* 163. 535. *Barnes Notes, 33.* See *Tidd's Practice, 79.* 2. *Crompt. Pract. 120.*

### Ruffell against Collins.

### Case 27.

**ASSUMPSIT** was brought upon two several promises, and entire damages were given.—*SYMPSON* moved in arrest of judgment, that for one of the promises an action will not lie. It was a general *indebitatus* for work and labour done, which was urged to be too general and uncertain.—By THE COURT. It is after verdict. S. C. 1. *Sid. 425.* S. C. 1. *Vent. 44.* S. C. 2. *Keb. 552.* *Post. 46. 289.* *Rob. 5.* *Cro. Jac. 207.* 12. *Mod. 16. 250. 308. 324.* *Fins. 302.* 10. *Mod. 296.* 816. *alk. 446.* *Sra. 127.* 1. *Comp. Dig. 152.* urged

An *assumpsit* for "work and labour" generally, without stating the particulars, is good.

Michaelmas Term, 21. Car. 2. In B. R.

RUSSELL  
against  
COLLINS.

\* [ 9 ]

Case 28.

A husband is liable for necessities sold to his wife, except she has eloped, and he has given notice not to trust her.

S. C. 2. Keb. 554. S. C. 1. Vent. 42. 146, S. C. 1. Sid. 425.—(\*) See this case, and the Notes thereon, Post. 124. to 144.

well enough, as *pro mercimoniis venditis et pro jervitiis*, without mentioning the goods or the service in particular.—And the plaintiff had judgment.

\* Dyer against East.

POLLEXFEN moved for a new trial in an action upon the case, upon a promise for wares that the wife took up for wearing apparel.—KELYNGE, Chief Justice. The husband must pay for the wife's apparel, unless she elope, and he give notice not to trust her: that is the Case of *Scott v. Manby (a)*, which was a hard judgment; but we will not impeach it.—The plaintiff had judgment.

Case 29.

Beckett against Taylor.

Arbitrators may award one of the parties to discharge the other from his undertaking, so pay a debt to a third person.

S. C. 2. Keb. 546. 554. Cro. Car. 541. 10. Mod. 100.

204. Ld. Ray. 123. 246. 898. 964. Com. Rep. 114. 183. 328. 547. 12. Mod. 8. 116. 130. 424. 587. Fitzg. 168. 270. 2. Bar. K. B. 291. See a Treatise on the Law of Awards, by S. KYPE esq. page 103. to 107. where all the Cases upon this point are collected; and the 4. & 5. Ann. c.

(4) Stiles, 385.

DEBT upon a bond to submit to an award. An exception was taken to the award, Because the concurrence of a third person was awarded; which makes it void. They award, that one of the parties shall discharge the other from his undertaking to pay a debt to a third person; and it was pretended, that the third person, being no party to the submission, was not compellable to give a discharge. But it was answered, that he is compellable; for in case the debt be paid him, he is compellable in equity to give a release to him that had undertaken to pay it; and the Case of *Giles v. Southward (b)* and 1. Roll. Abr. 248. were cited.—Judgment nisi.

Case 30.

Memorandum.

On the creation of a Serjeant at law the rings given to the Chief Justices and the Chief Baron must weigh twenty shillings.

S. C. 2. Keb. 552. S. C. Ray. 192.

\* [ 10 ]

Case 31.

\* Clerke against Rowell and Phillips,

A verdict in one ejectment cannot be given in evidence on the trial of another.—See 3. Mod. 141. 5. Mod. 386. 10. Mod. 292. 12. Mod. 319. 339. Stra. 1151. Ld. Raym. 1292. Bull. N. P. 232, and Gilbert's Law of Evid. Lofft's Edit. 35.

A TRIAL AT BAR in an Ejectment for lands settled by Sir Pexall Brookhurst—THE COURT said, that a trial against others shall not be given in evidence in this cause.

## Michaelmas Term, 21. Car. 2. In B. R.

TWISDEN, *Justice*, said, that an entry to deliver a declaration in ejectment should not work to avoid a fine, but that it must be *in actual entry*. Upon which last matter the plaintiff was non-suited.

An entry in ejectment to deliver declaration is not sufficient to avoid a fine; for it

must, for this purpose, be an *actual entry*.—S. C. 1. Vent. 42. S. C. 1. Saund. 319. S. C. 2. Keb. 555. S. P. 1. Vent. 332. S. P. 2. Stra. 1086.—See also Vent. 248. 3. Keb. 218. 10. Mod. 124. 12. Mod. 113. Ante, 125. 2. Stra. 1128. Ld. Ray. 750. 3. Burr. 1897. Runnington's Eject. 79. Dougl. 460. 483, and note (1), 485, 486.

### Redman's Case.

### Case 32.

BALDWIN, *Serjeant*, moved, that one *Redman*, an attorney of the court, who was going into *Ireland*, might put in *special bail*.—TWISDEN, *Justice*. A clerk of the court cannot put in bail. You have filed a *bill* against him, and so waived his putting in bail.—KELYNGE, *Chief Justice*. You may remember *Wolby's Case* (a); but we discharged him by reason of his privilege, and took common bail.—TWISDEN, *Justice*. You cannot declare against him *in custodia*. But although we cannot take *bail*, yet we may commit him, and then deliver him out by *mainpernancy*.—JONES. If he be in court *in propria persona*, you cannot proceed against his bail.—THE COURT agreed, that the attorney should not put in bail.

An attorney sued by bill cannot be arrested; and therefore, although he be about to leave the kingdom, the Court will not oblige him to find *special bail*.

2. Stra. 864. 964. Ld. Ray. 156. 2. Crompt. 113. Tidd's Practice, 50. 76. 1. Will. 292. 306. 2. Bl. Rep. 1085. And see the Case of Comerford v. Price, Dougl. 312, and note (85). p. 314.—(a) 3. Keb. 526.

S. C. 2. Keb. 555. 12. Mod. 122. 163. 535.

### Grafton's Case.

### Case 33.

GRAFTON, one of the Company of Drapers, was brought into court by *habeas corpus*. In the return the cause of his imprisonment was alleged to be, for that being chosen of the livery he refused to serve.

The City of London may sue a freeman for not taking-up his livery, and recover it by action of debt.

THE COURT. They might have fined him, and have brought an action of *debt* for the sum; but they cannot imprison him.

KELYNGE, *Chief Justice*. The court of aldermen may imprison a man who shall refuse to accept the office of alderman, because they are a court of record, or they may want aldermen else.—So he was released.

S. C. 2. Keb. 955. S. C. March. 179. 1. Sid. 283. 6. Mod. 132.

8. Mod. 132. 12. Mod. 269. 665. Comyns, 22. Ld. Ray, 1566. 1. Term Rep. 118.

### \* Anonymous.

### \* [ 11 ]

### Case 34.

IT was moved for the plaintiff, that a person named in the *simul cum* being a material witness might be struck out; and it was granted.—KELYNGE, *Chief Justice*, said, that if nothing was proved against him, he might be a witness for the defendant.

In an action for a tort against several, those against whom there is no

proof may be acquitted, and give evidence for the defendant.—1. Sid. 441. Bull. M. P. 285, 286. Strange, 633, 1104. Annally's Rep. 123. 133. 162. 264.

Clerke,

Cafe 35.

Clerke, on the Demife of Prin, *againft* Heath.

A deed under seal, when properly proved, may be read in evidence, though the seal be broken off.

8. C. 2. Keb.

556.

8. C. 1. Vent.

74.

8. C. 1. Sid. 426. 2. Show. 28. 2. Lev. 220. Palm. 403. 8. Mod. 278. 8. Bull. 79. 5. Co. 23. Cro. Eliz. 110. 11. Co. 28. 2. Lev. 220. March, 199. 1. Strange, 512. Ld. Ray. 1536. and see Gilbert's Law of Evidence, Lofft's Edition, p. 111. to 114. Bull. N.P. 267.

What shall be evidence of episcopal ordination.

Post. 90.

Ld. Ray. 893.

1206.

(a) See 1. *Elim*. c. 2. and 12. *Eliz*. c. 12. f. 3.

**EJECTMENT.** The plaintiff claimed by a lease from *Thomas Prin*, clerk. It was objected, that *Prin* had not taken the oath according to the late act of uniformity, 12. *Car. 2*. c. 17. f. 27. whereupon he produced a certificate of the bishop that had only a small bit of wax upon it.—*TWISDEN, Justice*. If it was sealed, though the seal be broken off, yet it may be read; as we read recoveries after the seal is broken off; and I have seen letters of administration given in evidence after the seal broken off; and so of wills and deeds. Accordingly it was read.

**SECONDLY,** It was objected, that the church is *ipso facto* void by the act of uniformity, 12. *Car. 2*. c. 17. if the incumbent had no episcopal ordination. So they shewed that *Prin* was ordained by a bishop. It was likewise proved, that he had declared his assent and consent to the common prayer (a) in due time, before *St. Bartholomew's* day.

The 12. *Car. 2*. c. 17. does not extend to livings without cure of souls.

\* [ 12 ]

Whoever is admitted, instituted, and inducted, into any ecclesiastical benefice, shall, *ipso facto*, have the cure of souls; and therefore a parson and vicar may have a concurrent cure in the same church; for it may have two patrons, each having an undivided moiety.

8. C. 2. Keb.

556.

8. C. 1. Vent.

14. S. C. 1. Sid. 426. 2. Co. 44. Fitzg. 107. 309. 8. Mod. 183. 367. 10. Mod. 64. 385. 12. Mod. 3. 232. 1. Ld. Ray. 7. 265. 2. Ld. Ray. 856. 1205. 1509. 2. Stra. 715. 776. 942. 2. Peare Wms. 326. Gilb. Eq. Rep. 178. 180. 3. Burn's Ecclef. Law, 347. 1. Black. Com. 386. 3. Will. 365.

**THIRDLY,** It was then urged, that the statute of 12. *Car. 2*. c. 17. does not confirm the plaintiff's lessor in this living, for that it is not a living with cure of souls; for it has a vicarage endowed.—*TWISDEN, Justice*. If it be a living without cure, the act does not extend to it.

\* **MR. SOLICITOR.** The presentation does not mention cure of souls.—(So they read a presentation of a *rector*, and another of a *vicar*, in neither of which any mention was made of cure of souls, but the *vicar's* was *residendo*.) If both be presentative, the cure shall be intended to be in the *vicar*.—*KELYNGE, Chief Justice*. Why may not both have the cure?—**MR. SOLICITOR**, If the *vicar* be endowed, the *rector* is discharged of residence by act of parliament of 21. *Hon. 8*. c. 13. f. 28.

**TWISDEN, Justice.** Synodals and procurations are duties due to the ordinary, which vicars, when the parsonages are appropriated, always pay. But I question whether they who come into a church by presentation to, and institution by, the bishop have not always the cure of souls. It is true, in *donatives*, where the minister does not come in by the bishop's institution, there is no cure; but they who come in by institution of the bishop have their power delegated to them from him, and generally have cure of souls.

MR.

Michaelmas Term, 21. Car. 2. In B. R.

MR. SOLICITOR. There are several *rectories* with-  
cure.—TWISDEN, *Justice*. When came *rectories* in?—  
RETON, *Justice*. After the Council of *Lateran*; and *vicars*  
e in the seventeenth year of KING JOHN. Before  
Council of *Lateran* the bishop presented *teachers*, and received  
tithes himself; but since that time he hath appointed others to  
charge, and saith, *Accipe curam tuam et meam*.—KELYNGE  
TWISDEN, *Justices*. It is said so by LORD COKE, but  
done.

CLERKE, ON  
THE DEMISE  
OF PRIN,  
against  
HEATH.

TWISDEN, *Justice*. Wherever there is a cure of souls, the  
rch is visitable, either by the bishop, if it belong to him;  
a layman, he must make delegates; if to the king, my lord  
per does it; and where a man comes in by presentation, he is  
*nā facie* visitable by the bishop.

KELYNGE, *Chief Justice*. I take it, that whoever comes in  
er a bishop's institution hath the cure.

TWISDEN, *Justice*. The Case of *Grendon* (a) says expressly, that  
bishop hath the cure of souls of all the diocese, and doth by  
itution transfer it to the parson; so that *primā facie* he who  
stituted hath the cure. The *vicarage* is derived out of the  
*sonage*; and if the vicar come to poverty, the parson is bound  
maintain him. There is an appropriation to a corporation; but  
corporation cannot have the cure of souls, being a body politic;  
when they appoint a vicar, he, coming under the bishop by  
itution, hath cure of souls; and a *donative*, when it comes to be  
*lentative*, hath the cure of souls.—KELYNGE, *Chief Justice*,  
ced.

(a) Grendon v.  
Bishop of Lia-  
coln,  
Plowd. 495.  
Bendl. 293.

1. Term Rep.  
379. 403.

TWISDEN, *Justice*. We hold, that when a rector comes in by  
itution, the bishop hath power to visit him for his doctrine  
his life; for he hath the particular cure, but the bishop the ge-  
al; and that the bishop hath power to deprive him.

See Maddox  
Case, 2. K. b.  
578. that the  
bishop is in  
this case *exple-  
rator visitorum*.

Abbot against Moore.

Case 36.

THE plaintiff declares, that whereas one *William Moore* was  
indebted to him two hundred and ten pounds, and whereas  
said *William Moore* had an ANNUITY out of the defendant's  
ds, that the defendant, in consideration that the plaintiff had  
eed that the defendant should pay so much money to the plaintiff,  
defendant did promise to pay it. \* After a verdict it was ob-  
bed, in arrest of judgment, that here was not any consideration.  
And THE COURT was of that opinion.

A promise by  
the grantor of a  
rent charge to  
pay it to a third  
person, in  
consideration of  
a debt due to  
him from the  
grantee, will  
not maintain an

appe.—S. C. 2. Keb. 543. 557. Post. 43. 10. Mod. 294. 331. 1. Ld. Raym. 358. 368.  
Ira. 94. 592. 2. Stra. 933. 1027. 2. Term Rep. 80.

\* [ 13 ]

THE PLAINTIFF would then have discontinued the action,  
THE COURT would not suffer that after a verdict.

An action can-  
not be disconti-  
nued after ver-

—Post. 41. 1. Saund. 210. Cro. Eliz. 575. 1. Roll. Abr. 27. pl. 50. 29. pl. 60.  
1. Lev. 45. 1. Sid. 60. 2. Danv. 156. N. Lutw. 91.

The

Michaelmas Term, 21. Car. 2. In B. R.

Case 37.

The Constable of Homeby's Case.

The justices of the peace may elect constables of particular parishes, although no constables had before been chosen for such parish, provided there be no leet for such purpose. 5. C. 2. Keb. 557. 5. C. 1. Bac. Abr. 440. Post. 78. 1. Salk. 135. 381.

5. Mod. 96. 129. 6. Mod. 96. 2. Saund. 290. 2. Show. 75. 2. Stra. 1050. 8. Mod. 215. 227. 12. Mod. 88. 115. 180. 256. Fitzg. 292. 1. D. Ray. 169. Cowp. 613.

**T**HURLAND moved to quash an order made by the justices of the peace for one to serve as constable in *Homeby*.

**MORETON, Justice.** If a leet neglect to chuse a constable, the justices of peace, upon complaint made to them, shall, by the statute 13. & 14. Car. 2. c. 12. l. 15. appoint a constable.

**TWIDEN, Justice.** In this case there are affidavits that there never was any constable there; and I cannot tell, whether or no the justices of peace can erect a constablewick where never any was before. If he will not be sworn, let them *indict* him for not executing the office, and let him traverse; that there never was any such office there. — **KELYNCE, Chief Justice.** Go and be sworn; or if the justices of the peace commit you, bring your action of false imprisonment.

**TWIDEN, Justice.** If there be a court-leet that hath the choice of a petty constable, the justices of peace cannot chuse there; and if it be in the hundred, I doubt whether the justices of the peace can make more constables than were before. High constables were not *ab origine*, but came in with justices of the peace, in the tenth year of *Henry 4*.

**KELYNCE and MORETON contra.** — **MORETON, Justice.** The book of *Villarum* in the EXCHEQUER sets out all the vills; and there cannot be a constablewick created at this day. — **THE COURT** in this case ordered him to be sworn.

The servants of members of parliament are exempted from being constables. — Cro. Car. 389. 2. Keb. 477. 578. 1. Lev. 265. Post. 22. Dougl. 538. 686.; and see 2. Hawk. P. C. 99. to 102. 4. Com. Dig. "Leet" (M 7.).

**T**HURLAND. If they chuse a parliament-man's servant constable, they cannot swear him. — **TWIDEN, Justice.** I do not think the privilege extends to the tenant of a parliament-man, but to his servant.

— Cro. Car. 389. 2. Keb. 477. 578. 1. Lev. 265. Post. 22. Dougl. 538. 686.; and see 2. Hawk. P. C. 99. to 102. 4. Com. Dig. "Leet" (M 7.).

Case 38.

The King against Bliffet and Wincott.

To meet tumultuously at conventicles is a breach of the peace.

5. C. 2. Keb. 558. 8. Mod. 45. 114. 2. Show. 234. 238. 241. 2. Vent. 369. 6. Mod. 141. 11. Mod. 116. 1. Hawk. P. C. 296.; and the statute of 22. Car. 2. c. 1. and the Toleration Act, 1. Will. & Mary, c. 18.

\* [ 14 ]

Case 39.

\* Lee against Edwards.

The want of an averment helped after verdict.

**A**N ACTION ON THE CASE was brought upon two promises. — **FIRST**, In consideration the plaintiff would bestow his labour and pains about the defendant's daughter, 2. C. 1. Vent. 44. 5. C. 1. Sid. 428. 5. C. 2. Keb. 559. 566. 5. C. 1. Lev. 280. Post. 285. Fitzg. 174. 275. 8. Mod. 2. 10. Mod. 229. 300. 12. Mod. 102. 105. 242. 306. 421. 434. 510. 565. 1. D. Ray. 284. 669. 1. D. Ray. 810. 1061. 1521. 1. Stra. 79. 1. Stra. 1011. Cowp. 426.; and see 5. Com. Dig. "Pleader" (C 61.).

and

Michaelmas Term, 21. Car. i. In B. R.

and would cure her, he did promise to pay so much for his labour and pains, and would also pay for the medicaments.—SECONDLY, That in consideration he had cured her, he did promise to pay, &c.

Let  
against  
EDWARDS

RAYMOND moved in arrest of judgment, that he did not *aver* that he had cured her, the consideration of the first promise being future, and both promises found, and entire damages given.

TWISDEN, *Justice*. It is well enough; for now it lies upon the whole record whether he hath cured her or no. If it had rested upon the first promise, it had been naught; but in the second promise there is an averment, that he had cured her; so that now after verdict it is helped, and the want of an averment is holpen in many cases. Judgment *nisi*, &c.

Anonymous.

Cafe 40.

TWISDEN, *Justice*. If a man be in prison, and the marshal die, and the prisoner escape, there is no remedy but to take him again.

Escape on death  
of the marshal.  
3. Co. 78.  
Hob. 102.

1. Sid. 330. 2. Mod. 136. Strange, 423. and 8. & 9. Will. 3. c. 27. and 1. Ann. c. 6.  
2. Term Rep. 126. 3. Term Rep. 583.

Anonymous.

Cafe 41.

TWISDEN, *Justice*. Pleas in abatement come too late after pleading.

Cro. Car. 9.  
2. Sira. 1120.

1. Vent. 236. Latch. 83. Dyer, 210. in marg. 2. Roll. 294. Carth. 26.  
1. Com. Dig. 5. Jennings v. Ward, 1. Term Rep. 278. 3. Term Rep. 642.

Hall *against* Seabright.

Cafe 42.

TRESPASS; wherein the plaintiff declared, that the defendant, on the twenty-fourth day of *January*, entered and took possession of his house, and kept him out of possession to the day of the exhibiting the bill. The defendant pleaded, that *ante prædictus tempus quo*, SCILICET, &c. the plaintiff did license him (the defendant) to enjoy the house until such a day.

To trespass, the  
defendant may  
plead a licence  
to enjoy the  
premises from  
such a day to  
such a day.

SAUNDERS. The plea is naught in substance; for a licence to enjoy from such a time to such a time is a *lease*, and ought to be pleaded as a *lease* and not as a *licence*; it is a certain present interest.

S. C. 2. Keb.  
534-561. 598.  
S. C. 1. Sid.  
428.

Hob. 35. Moor, 861. 8. Mod. 42. 12. Mod. 610. Win. Ent. 1095. Carth. 218. Cro. Eliz. 876. 1. Ld. Ray. 403. 2. Term Rep. 24. 166.

TWISDEN, *Justice*. It is true\*, that in the Year Book of 5. Hen. 7. pl. 1. it is said, that if one doth license another to enjoy his house till such a time, it is a lease; but whether it may not be pleaded as a licence, I have known it doubted.—Judgment *nisi*.

\*[15]

Coppin *against* Hernall.

Cafe 43.

TWISDEN, *Justice*, said, upon a motion in arrest of judgment because an award was not good, that the umpirage could not be made till the arbitrators time were out: and if any such power

An umpirage  
cannot be made  
until the arbi-  
trators time

expired.—S. C. 2. Saund. 129. S. C. 1. Lev. 285. S. C. Ray. 187. S. C. 1. Sid. 428. 455. S. C. 2. Keb. 562. 629. Post, 276. 1. Roll. 261, 2. Vern. 100. 435. 1. Ld. Ray. 222.

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**Copy  
against  
BENJAMIN.**

be given to the umpire, it is naught in its constitution; for two persons cannot have a several jurisdiction at one and the same time.

But see the case of *Roe v. Doe*, 2. Term Rep. 645. where it is determined, that arbitrators who have the power of chusing an umpire, may chuse one the instant they begin to take the matters referred into consideration.—See also Kyd's Law of Awards, 44. to 50. 117. &c. 2. Term Rep. 643. 3. Term Rep. 592. *in notis.*

### Cafe 44.

Anonymous.

Panel.

**T**HE law allows the defendant a copy of the panel, to provide himself for his challenges.

2. Hawk. P. C. ch. 43. and see 42. Edw. 3. c. 11. and 7. & 8. Will. 3. c. 3. 2. Hawk. 577. and 4. State Trials, 101. to 104.

### Cafe 45.

Fettyplace's Cafe.

The misprision of "afferere" for "afferre," may be amended if right on the roll.

5. Co. 45. 2. 10. Mod. 88.

Comyns, 60. 250. 376. 417. 2. Barnes, 12. 153. 287.—(a) Cro. Eliz. 466.

**A**CTION ON THE CASE upon a promise, in consideration that the plaintiff would "afferere" instead of "afferre," &c. It was moved in arrest of judgment; and the case of *Bedel v. Sir Edward Wingfield (a)* was cited—TWISDEN, Justice. I remember "distractionem" for "distructionem" cannot be helped; so neither "vaccaria" for "vicaria." So THE COURT gave directions to see if it was right on the roll.

See also the 8. Hen. 6. c. 12. 1. Com. Dig. 317. Dougl. 114. 135. 1. Term Rep. 783. 2. Term Rep. 762. and the Case of *Rex v. Beech*, Dougl. 194. note (25). Cowp. 229. where it is said, that the true distinction seems to be, that "where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material."

### Cafe 46.

Holloway's Cafe.

Trinity Term, 21. Car. 2. Roll' 1844:

Estoppel.

8. C. 1. Freem. 107.

8. C. 1. Saund.

316. 8. C. 2. Keb. 564. 3. Lev. 3. 45. Raym. 47. Moor, 420. Allen, 52. Cro. Jac. 375. Co. Lit. 35a. Cro. Eliz. 756. Stra. 610. 1. Roll. Abr. 872. 1. Term. Rep. 86. 701. 2. Term Rep. 171. 3. Term Rep. 365. 438. 441.

\* [ 16 ]

### Cafe 47.

\* Anonymous.

The ancient form of taking bail, and declaring in civil actions.—*Ante*, 11. Cro. Jac. 449. 6. Mod. 188. 2. Sid. 163. Comyn's, 75. 556. 20. Mod. 24. 153. 270. 280. 2. Stra. 922.

**K**ELYNGE, Chief Justice. The course of the court is, that if a man be brought in upon a *latitat* for twenty or thirty pounds, we take the bail for no more; but yet he stands

bail

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bail for all actions at the same party's suit; otherwise if a stranger bring an action against him.—*TWISDEN, Justice.* They cannot declare till he hath put in bail; and when we take bail, it is but for the sum in the *latitat*, perhaps thirty pounds, or forty pounds; but when he is once in, he may be declared against for two hundred pounds.

But see rule Trinity Term 22. Car. 2. 6. Mod. 267. 1. Salk. 102. And it is now settled, that when the plaintiff declares for or recovers a greater sum than is expressed in the process upon which he declares, the bail shall not be discharged, but be liable for so much as is sworn to and indorsed on the pro-

cess, or for any lesser sum which the plaintiff in such action shall recover. Rule Easter Term 5. Geo. 2. Loft, 545.; and it is also determined, that the bail are liable to the costs of the original action. Dougl. 330. 1. Term Rep. in C. B. 76.; and see Tidd's Practice, 131.

### Smith *against* Wheeler.

Case 48.

*Easter Term, 20. Car. 2. Roll 570.*

**A WRIT OF ERROR** was brought to reverse a judgment in the common pleas, upon a special verdict in an ejectment.

The jury found, that one *Simon Mayne* was possessed of a rectory for a long term, and having conveyed the whole term in part of it to certain persons absolutely, he conveyed his term in the residue, being two parts, in this manner; *scilicet*, in trust for himself during life, and afterward in trust for the payment of the rent reserved upon the original lease, and for several of his friends, &c. **PROVIDED**, that if he should have any issue of his body at the time of his death, then the trusts to cease, and the assignment to be in trust for such issue, &c. And there was **ANOTHER PROVISIO**, that if he were minded to change the uses, or otherwise to dispose of the premises, that he should have power so to do by writing in the presence of two or more witnesses, or by his last will and testament. **THEY FURTHER FIND**, that he had issue male at the time of his death, but made no disposition pursuant to his power; and that in his life-time he had committed treason; and they find the act of his attainder.

The question was, Whether the rest of the term that remained unexpired at the time of his death was forfeited to the king?

The points made were two: **FIRST**, Whether the deed was fraudulent? **SECONDLY**, Whether the whole Term was not forfeited by reason of the trust or power of revocation?

**PEMBERTON** argued, that the deed was fraudulent, because he took the profits during his life, and the assignees knew not of the deed of trust. The Court hath in these cases adjudged fraud upon circumstances appearing upon record without any verdict. The case that comes nearest to this is *Rex v. \* Earl Nottingham and Others*, in *Lane*, 42. **SECONDLY**, he argued, that there was a trust by express words; and if there be a trust, then

*A.* being possessed of a term for eighty years conveys the whole term in part of the premises absolutely, and the residue in trust for himself for life, with remainder over; **PROVIDED**, that if he had issue the trusts should cease, and the assignment be in trust for such issue, with a power of revoking the said trust by his will in writing. This trust estate is not fraudulent, nor forfeited after the death of *A.* for HIGH TREASON committed by him during his life-time.

S. C. post. 38.  
S. C. 1. Free. 9.  
S. C. 1. Vent. 128.  
\*[ 17 ]  
S. C. 1. Lev. 279.  
S. C. 2. Keb. Raym. 120.  
20. Mod. 126.  
not Ambler, 32.

564. 608. 644. 763. 772. 7. Co. 13. Lane. 54. 113. Hard. 466. And. 294. 2. Roll. Abr. 34. 1. Roll. Abr. 343. March. 25. 83. 1. Sid. 206. 403. 120. 359. 367. 415. 2. Bac. Abr. 581. 3. Bac. Abr. 756. 2. Hawk. P. C. 639.

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Michaelmas Term, 21. Car. 2. In B. R.

SMITH  
against  
WHARLER.

See an Essay on  
the Nature and  
Laws of Uses  
and Trusts, by  
W. Saunders,  
234.

not only the trust but the estate is vested in the king by the express words of the statute of 33. Hen. 8. c. 20. The king, indeed, can have no larger estate in the land than the person attainted had in the trust; and if this conveyance were in trust for *Simon Mayne* only during his life, the king can have the land no longer: but he conceived it was a trust for *Simon Mayne* during the whole term. A trust, he said, was a right to receive the profits of the land, and to dispose of the lands in equity. Now if *Simon Mayne* had a right to receive the profits, and a present power to dispose of the land, he took it to be a trust for him; and that consequently, by his attainder, it was forfeited to the king.

(a) Styles Rep.  
20. 40. 75. 84.  
90. 94.  
1. Roll. 194.  
Alecyn, 14, 15.

COLEMAN *contra*: As for the matter of fraud; first, there is no fraud found by the Jury; and for you to judge of fraud upon circumstances, is against *The Chancellor of Oxford's Case*, 10. Co. 54. As for the trust, it must be agreed, that if there be any either trust or condition by construction upon these provisos in *Simon Mayne* in his life, between *Michaelmas* 1646 and the time of making the act, the trust will be vested in the king. But, Whether will it be vested in the king as a trust, or as an estate? For I am informed that it hath been adjudged between *The King v. Holland (a)*, that if an alien purchase copyhold-lands, the king shall not have the estate but as a trust; and the particular reason was, because the king shall not be tenant to the lord of the manor.

KELYNCE, *Chief Justice*. The act of parliament takes the estate out of the trustees, and puts it in the king.

COLEMAN. But I say, here is no trust forfeitable. By the body of the deed, all is out of him. If a man make a feoffment in fee to the use of his will, because he hath not put it out of him, there arises an use and a trust for himself. But in our case he hath put the uses out of himself; for there are several uses declared. But there is a further difference: if *Simon Mayne* had declared the use to others absolutely, and had reserved liberty to himself to have altered it by his will, that might have altered the case. But here the proviso is, that if at the time of his death he shall have a son, &c.; so that it is reduced to him upon a condition and contingency. As to the power of revocation, he cited *The Duke of Norfolk's Case (b)* in *Englefield's Case (c)*, which, TWISDEN said, came strongly to this. *Adjournatur (d)*.

(b) 1. Eq. Abr. 192. 3. Chan. Cases, 1. 14. 38. Pollexfen, 223.  
2. Chan. Rep. 229.

(c) 7. Co. 11. 4. Leon. 135. 169.

(d) This Case was argued a second

time at the bar, in Hilary Term 21. & 22. Car. 2. and in Easter Term 23. Car. 2. the judgment was affirmed. Vide post. 38, 39.

Anonymous.

• Anonymous.

Case 48.

**A**N INFORMATION was exhibited against one for a *libel*.—Pleading.  
**COLEMAN.** The party has confessed the matter in court, Kelyng. 11.  
 and the refore cannot plead *Not Guilty*.—TWISDEN, *Justice*. 2. Jones, 156.  
 You may plead *Not Guilty* with a *relicta verifications*. Cro. Eliz. 144.  
 2. Hawk. c. 31.  
 f. 1.

Horne *against* Ivy.

Case 49.

Michaelmas Term, 20. Car. 2. Roll 401.

**T**RESPASS for taking away a ship. The defendant justifies The king cannot  
 as servant under the patent whereby *The Canary Company* create a for-  
 is incorporated, and whereby it is granted, "That none but such feiture by let-  
 "and such should trade thither, on pain of forfeiting their ships ters patent.  
 "and goods, &c." and says, that the defendant did trade thither,  
 &c. The plaintiff demurs.

**POLLEXFEN** for the plaintiff contended, that the defendant **A JUSTIFICA-**  
 ought to have shewn the deed whereby he was authorized by tion to trespass  
 the Company to seize the goods (*a*); though he agreed, that for seizing a ship  
 for ordinary employments and services a corporation may appoint as forfeited, by  
 a servant without deed, as a cook, a butler, &c. (*b*). A corpo- authority of a  
 ration cannot license a stranger to fell trees without deed (*c*). corporation, must  
 Nor can they make a disseisor without deed, nor deliver a letter show that the  
 of attorney without deed (*d*). **SECONDLY**, The plea is double; authority was  
 for the defendant alleges two causes of a breach of their char- given by a deed  
 ter, viz. their taking in wines at *the Canaries*, and importing by its common  
 them here; which is double. Then there is a clause that gives seal.  
 the forfeiture of goods and imprisonment, which cannot be by S. C. 1. Vent.  
 patent (*e*). This patent I take also to be contrary to some acts 47.  
 of parliament, viz. 2. *Edw.* 3. c. 1. 2. *Edw.* 3. c. 2. 2. *Rich.* 2. S. C. 1. Sid.  
 c. 1. 11. *Rich.* 2. c. 2.; and these statutes the king cannot dis- 441.  
 pense withal by a *non obstante*. S. C. 2. Keb.  
 567. 604.  
 1. Ro. Ab. 514.  
 Dyer, 279.  
 3. Mod. 126.  
 4. Mod. 176.  
 1. Salk. 31.  
 6. Mod. 13.  
 Gilb. E. R. 213.  
 1. Vern. 130.  
 1. Peer. Wms.  
 656.  
 12. Mod. 3.  
 113. 423.

**TWISDEN, Justice.** For the first point, I think, they can-  
 not seize without deed, no more than they can enter for a con-  
 dition broken without deed.

**KELYNCE, Chief Justice.** We desire to be satisfied, Whe-  
 ther this is a *monopoly* or not?—It was ordered to be argued  
 again (*f*).

(*a*) 26. Hen. 6. pl. 8. 14. *Edw.* 4.  
 pl. 8. Bro. "Corporation," 59.

(*b*) *Plowd.* 95.

(*c*) 12. Hen. 4. pl. 17.

(*d*) 9. *Edw.* 4. pl. 59. Bro. "Cor-  
 poration," 24. 34. 14. Hen. 7. pl. 1.  
 7. Hen. 7. pl. 9. 1. Roll. Abr.

(*e*) 8. Co. 125. Noy, 123.

(*f*) It appears in *Kable and Ventris*,  
 that judgment was given in this case for  
 the plaintiff, on the first objection,  
 because the defendant justified by the

command of a corporation, without shew-  
 ing that his authority to seize the ship  
 was by a deed; and S. C. *Siderfin* says,  
 that the Court also held the bar bad in  
 substance, because the king by his patent  
 cannot create a forfeiture for the doing  
 those things which his patent prohibits.  
 See 3. Peer. Wms. 424. Hardres, 55.  
 Skinner, 135. 224. 8. Co. 125.  
 Palmer, 5. 3. Lev. 353. 1. Salk. 32.  
 5. Com. Dig. "Trade," (B.). 1. Burr.  
 526. 1. Term Rep. 118.

C 2

Pryn

Case 50.

\* Pryn against Smith.

To a *scire facias* against bail, a *releas* of caption and escape of the principal must shew out of what court the writ issued. Post. 24.

S. C. 2. Keb.

567.

Moor, 883.

2. Bull. 260.

**SCIRE FACIAS** in the court of king's bench upon a recognizance by way of bail upon a writ of error in the Exchequer Chamber. The defendant pleaded, That the plaintiff did, after judgment, sue forth a *capias ad satisfaciendum* out of this court to the sheriff of *Middlesex*, whereupon he was taken in execution, and suffered to escape by the plaintiff's own consent.—*JONES, for the plaintiff.* We have demurred, because they do not lay the place where this court was holden, nor where the plaintiff gave his consent.

Cro. Jac. 163. Dougl. 58. 2. Term Rep. 754.

Case 51.

Redman against Pyne.

To say of a watchmaker, that he is "a bungler, and cannot make a good piece of work," is not actionable. Post. 23.

S. C. 2. Keb.

568.

Sid. 425.

v. Lev. 276.

Raym. 184.

2. Show. 136.

293.

N. Lut. 334.

1. Ld. Ray.

610.

2. Ld. Ray.

1417. 1480.

2. Stra. 797.

420. 591. Fitzg.

121. 253.

**AN ACTION UPON THE CASE** was brought for speaking these words of the plaintiff, being a watchmaker: "He is a bungler," and knows not how to make a good piece of work:" but there was no *colloquium* laid of his trade.

**PEMBERTON.** The jury have supplied that, having found that he is a watchmaker. And it is true, that words shall be taken in *mitiori sensu*; but that is when they are doubtful. *Cawdry v. Higley, Cro. Car. 270. (a).*

**TWISDEN, Justice.** I remember a shoemaker brought an action against a man for saying that he was a cobbler; and though a cobbler be a trade of itself, yet it was held that the action lay, in **GLYN's** time.

**SAUNDERS.** If he had said, that he could not make a good watch, it would have been known what he had meant; but the words in our case are indifferent, and perhaps had no relation to his trade.—The judgment was ordered to be stayed.

6. Mod. 215. 8. Mod. 221. 10. Mod. 111. 196. 198. 12. Mod. 3. 307. 344. 682. Dougl. 153.

(a) S. C. Godb. 441.

Case 52.

Vere against Reyner.

Certainty.

Ante, 8.

Post. 46. 257.

S. C. 2. Keb. 573.

**AN ACTION UPON THE CASE** upon a promise to carry *duas carrestatas, &c.*—**ROTHERAM.** It is uncertain whether "*carrestata*" signifies a horse-load, or a cart-load.—Judgment *nisi, &c.*

This was a *demurrer* to the declaration; and it was objected, that the promise being to carry two cart-loads *septimariatim*, one after the other, it ought to have shewn when; but judgment was given for the plaintiff, because no day

being appointed, it shall be intended immediately following the promise. S. C. 2. Keb. 573. For a description of the several kinds of *certainty* required in pleadings, see *Rex v. Horne, Cowp. 682.* Dougl. 153.

\* Veal against Warner.

Case 53.

Easter Term, 21. Car. 2. Roll 514.

**T**WISDEN. I have known, if a judgment be given, and there is an agreement between the parties not to take out execution till next Term, and they do it before, that the Court has set all aside.

ment. Post. 24.—S. C. 2. Keb. 568. 3. Term Rep. 183. And see the S. C. 1. Saunders, 326.

The Court will stay proceedings if execution be taken out contrary to agreement.

Anonymous.

Case 54.

**O**NE brought up by *habeas corpus* out of the *Cinque Ports*, upon an information for *breaking prison*, where he was in custody upon an execution for debt. BARRELL moved against it.

TWISDEN, *Justice*. Suppose a man be arrested in the *Cinque Ports* for a matter arising there, and then another hath cause to arrest him here, is there not a way to bring him up by *habeas corpus*?

BARRELL. It was never done; but there has been a *habeas corpus* thither *ad faciendum & recipiendum*.

KELYNGE, *Chief Justice*. If a man be in prison in THE FLEET, we bring him up by *habeas corpus* in case there be a suit against him here.

TWISDEN, *Justice*. Where shall such a man be sued upon a matter arising out of the *Cinque Ports*?

BARRELL. If it be transitory, it must be sued there; if local, elsewhere.

TWISDEN, *Justice*. Then you grant, if local, that there must be a *habeas corpus*.—And so it was allowed in this case (a).

(a) But see the case of Melfome v. tute 4. & 5. Will. & Mary, c. 21. Gardner, Cowp. 116. and the sta. f. 3.

A prisoner in execution, in the *cinque ports*, may be brought up by *habeas corpus*, and charged with an action out of that jurisdiction.

Cro. Jac. 543.  
1. Sid. 386.  
6. Mod. 22.  
12. Mod. 666.

The King against Burrell.

Case 55.

**T**WO JUSTICES OF THE PEACE made an order in session-time against one *Reignolds*, as reputed father, for the keeping of a bastard-child: *Reignolds* appealed to the same sessions, where the justices made an order that one *Burrell* should keep it.

JONES moved to set aside this order, though an order of sessions upon an appeal from two justices; because, he said, the first order being made in session-time, that sessions could not be said to be the next within the statute of 18 Eliz. c. 5. and because the justices of the sessions did not quash the order made by two justices.

472. 478. 480. 482. 486. 534. 2. Bulst. 341. 5. Mod. 208. 329. 30. Mod. 84. 271. 1. Ld. Ray. 394. 471. 2. Ld. Ray. 1198. 1363. 1423. 3. Peer. Wms. 275. 6. Mod. 7. Dougl. 632. 3. Term Rep. 496. See Const's Edit. of Bott, vol. i. 441 to 447.

An appeal against an order of bastardy must be to the next sessions after notice.

8. C. 2. Keb. 575.  
S. C. 1. Vent. 48.  
2. Bulst. 355.  
2. Salk. 476.  
84. 271. 1. Ld. Dougl. 632.

## Michaelmas Term, 21. Car. 2. In B. R.

**THE KING**  
*against*  
**BURRELL.**

**KELYNCE, Chief Justice.** They ought to have done that.

**TWISDEN, Justice.** They may vacate the first order, and refer it back to two justices as *res integra*.

An order of  
maintenance  
to pay so much  
a week "till  
the child is  
twelve years  
old," is bad.

THE ORDER being read, one clause of it was, That *Burrell* should pay twelve-pence a week for keeping the child, till it came to be twelve years of age. This **TWISDEN, Justice**, said was ill; for it ought to be, so long as it continues chargeable to the parish.—The parties were bound over to appear at the next assizes in *Essex*.

1. Sid. 222. 1. Vent. 48. 336. 1. Salk. 121. 2. Salk. 478. Annally's Rep. 160. 2. Stra. 788. 3. Burr. 1679. See Mr. Conft's Edition of Bott's Poor Laws, vol. i. page 431 to 441.

\* [ 21 ]  
Cafe 56.

\* *Darbyshire against Cannon.*

An attachment  
lies for non-  
performance of  
an award made  
a rule of Court;  
but the defend-  
ant may plead  
"no award."

**SYMPSON** moved, That the defendant having submitted to a rule of Court for referring the matter, and not performing the award, an attachment might be granted against him; which was granted: but when the party comes in upon the attachment, he may alledge, that the award is void; and, if it appear to be so, he shall not be bound to perform it.

S. C. 2. Keb. 575. 8. Mod. 170. 10. Mod. 333. 12. Mod. 257. 317. 234. 525. 533. 585. 1. Stra. 695. 2. Peer. Wms. 450. 1. Barnes, 40. 2. Barnes, 55. 140. Salk. 71. 83. 1. Atk. 355. Sayer, 48. 2. Burr. 701. 3. Burr. 1258. Cowp. 23. 1. Term Rep. 266.

See the statute 9. & 10. Will. 3. c. 15. Kyd on Awards, 189.

Cafe 57.

Owen Hanning's Cafe.

On a *scire facias*  
to avoid a patent  
office, a person  
who is to be  
deputy to the  
plaintiff in case  
the patent is re-  
pealed may be  
examined as a  
witness.

IN a trial at bar upon a *scire facias* to avoid a patent of the office of searcher, exception was taken to a witness, that he was to be deputy to the party that would avoid the patent.—**TWISDEN, Justice.** If a man promise another, that if he recover his land the other shall have a lease of it, he is no good witness: so neither is this man.—But by the opinion of the THREE OTHER JUDGES he was allowed, because the suit here is between the king and the patentee.

S. C. 2. Keb. 576. 6. Mod. 60. 10. Mod. 151. 193. 12. Mod. 372. 1. Peer. Wms. 288. 1. Ld. Ray. 1008. 2. Vern. 375. 463. Prec. Ch. 234. Abr. Eq. 223. Comyns, 90. 2. Stra. 1253. Buller's N. P. 285. 3. Wulf. 97. Gilb. Evidence, 4th Edit. 122. 1. Term Rep. 163. 262. 296.

Cafe 58.

Worthy against Liddall.

The spiritual  
court may pro-  
ceed against a  
person for cal-  
ling a woman

**SAUNDERS** moved for a prohibition to the spiritual court, in a suit there, for calling the plaintiff "Whore."

**TWISDEN, Justice.** Opinions have been *pro* and *con* upon this point. The spiritual court has a jurisdiction in cases of

*whores*—S. C. 1. Sid. 433. S. C. 2. Keb. 577. 581. S. C. 1. Vent. 61. S. P. 1. Vent. 7. Cro. Car. 110. 2. Roll. Abr. 297. 1. Vent. 7. 220. 2. Lev. 63. Skin. 390. 6. Mod. 114. 8. Mod. 48. 112. 117. 140. 208. 12. Mod. 13. 236. 2. Ld. Ray. 809. 1101. 1136. 1287. 2. Stra. 823. 946. 1100. Silk. 692. Bunb. 312. 4. Com. Dig. "Prohibition" (G 14.). Carlisle v. Mappledoram, 2. Term Rep. 473.

whoredom

Michaelmas Term, 21. Car. 2. In B. R.

whoredom and adultery; but if suits there were allowed for such railing words, they would have work enough from *Billinggate*.

WORTHY  
against  
LIDDALL.

SAUNDERS relied upon this, that they were only words of heat.

KELYNGE, *Chief Justice*. They are judges of that.

SAUNDERS. In Michaelmas Term, 11. Jac. Roll 664. *Cryer v. Glover*, in the common pleas, the suggestion was, that she struck him, and he said, "Thou art a *whore*, and I was never struck by a *whore's hand* before." There a prohibition was granted; and I conceive the reason was, because there was a provocation. So in our case it \* appears that they were scolding. According 15. Jac. 1. Roll 325. *Stort v. Cole, Noy*, 114. and in the 15. Car. 2. in the case of *Loveland v. Goose*, 2. *Keb.* 334.—THE COURT refused to grant a prohibition.

\* [ 22 ]

Maddox against Peterborough.

Case 59.

WALLOP moved for a prohibition to the spiritual court for one Maddox, incumbent of a donative within the diocese of Peterborough, who was cited into the spiritual court for marrying there without a licence; and cited *Farechild's Case*, *Yelu.* 60.

The spiritual court may proceed against the incumbent of a donative for marrying persons without a licence.

BUT by KELYNGE, *Chief Justice*, MORETON AND RAINSFORD, *Justices*, the prohibition was denied. TWISDEN doubted; but said, if they might punish him in the ecclesiastical court *pro reformatione morum*, at least they could not deprive him.

S. C. 2. *Keb.* 578.  
S. C. 1. *Sid.* 432.  
715. 1056.

*Ante*, 11. *Post.* 90. *Jones*, 259. *Hob.* 290. 2. *Ld. Ray.* 1205. 2. *Str.*

Vide the case of *Powell v. Milborne*, 3. *Wilf.* 355. and *Campbell v. Aldrich*, 2. *Wilf.* 79. *Annally's Rep.* 326. and the Marriage Act of 26. Geo. 2. c. 33. 1. 8. by which it is made felony to solemnize matrimony without the publication of banns, or licence first had and obtained from those who have authority to grant the same. See also 21. Geo. 3. c. 53. 1. *Term. Rep.* 396. 403.

Doctor Poordage.

Case 60.

BARTUE moved for a writ of privilege for him, he being a practising physician in town, and chosen constable in a parish.

A physician is not exempted, by the common law, from being elected constable.

THE COURT said, if the office go by houses, he must make a deputy. But upon consideration the motion was refused; and a difference made between an attorney or barrister at law, and a physician. The former enjoy their privilege, because of their attendance in publick courts, and not upon the account of any private business in their chambers; and a physician's calling

S. C. 2. *Keb.* 578.  
S. C. 1. *Sid.* 431.

*Ante*, 13. 1. *Roll. Abr.* 533. 541. 1. *Lev.* 233. *Comyns*, 312. 6. *Mod.* 12. 19. 10. *Mod.* 351. 1. *Str.* 698. 2. *Str.* 1107.

## Michaelmas Term, 21. Car. 2. In B. R.

**DECTOR  
FOURDAGE.**

is a private calling: Wherefore they would not introduce new precedents (a).

(a) The defendant was a member of the college of physicians in London, and was chosen constable of the parish of Bradfield in Berkshire, for a house he had there. It is said in *Siderfin*, that he was discharged; but in *Pindar v. Daily*, Comb. 31. by WYTHERS, Justice, the report by *Siderfin* is said to be good law; and S.C. 2. Keble, 578. states the custom

of Bradfield, and agrees, that the writ of privilege lay not.—By the 32. Hen. 8. c. 40. members of the College are excused from the office in London. See also the 5. Hen. 8. c. 6. 6. Will. 3. c. 4. 2. Hawk. P. C. 100. See also *Rex v. Gouge*, Cowp. 13. *Rex v. Clark*, 1. Term Rep. 679.

### Cafe 61.

### Sir John Kirle *against* Ofgood.

To say of a justice of the peace that "he is sworn, and not fit to be a justice," is actionable.

\* [ 23 ]

S.C. 1. Vent. 50.  
S. C. 2. Keb. 548. 579.  
S.C. 1. Lev. 280.  
S.C. 1. Sid. 432.  
1. Ro. Ab. 57.  
N. Lutw. 409.  
3. Mod. 139.  
263.  
1. Lev. 52.  
Stiles, 22. 210.  
2. Ld. Raym. 812. 1369.  
1. Stra. 617.  
2. Stra. 1168.  
6. Mod. 270.  
8. Mod. 195.  
10. Mod. 186.  
12. Mod. 195.

**A**N ACTION FOR WORDS, VIZ. "Sir John Kirle is a sworn justice, and not fit to be a justice of the peace, to sit upon the bench; and so I will tell him to his face (a)." Moved in arrest of judgment, Because to say a man is not actionable; for it may be understood of swearing in common discourse.

**JONES.** The words are actionable, because applied to his office; as in *Stukely v. Bulhead*, 4. Co. 16. and *Fleetwood's Case*, in *Hobart* 267. Though a man's office is not named, yet if the words do refer in themselves, or are applied to it, they are actionable: so in our case.

**WINNINGTON.** They are not actionable, for they admit of a construction in *mitiori sensu*: in *Stukely's Case* that has been cited, corruption in his office is necessarily implied, but not in this case. *Roll* 56.

**KELYNGE, Chief Justice.** He calls him in effect a corrupt justice; and that supplies the communication concerning his office: words must be construed according to common acceptance.

**MORTON, Justice.** I see little difference between this and *Sir John Isam's Case*, Cro. Car. 14. and *Sir William Massam's Case*, Cro. Car. 223.

**RAINSFORD, Justice,** accorded. He cited 1. *Roll* 53. and 4. Co. 16. *Stukely's Case*.

**TWISDEN, Justice,** was of the same opinion; for the words tend to disgrace him in his office.—Judgment for the plaintiff.

(a) See *Rex v. Berry*, 4. Term Rep. 217.

### Cafe 62.

### The Case of Hastings, an Attorney.

An attorney sworn and admitted into any of the superior courts may practise in any inferior court, unless such court, by charter or prescription, is restrained to a certain number, in exclusion of others. Post. 118.—S. C. 2. Keb. 58c. S. C. 1. Sid. 410.

**WINNINGTON** complained to the Court on the said *Hastings's* behalf, that he being an attorney of this court was not suffered to appear for his client in the court at *Stepney*. *Stepney* courts may practise in any inferior court, unless such court, by charter or prescription, is restrained to a certain number, in exclusion of others. Post. 118.—S. C. 2. Keb. 58c. S. C. 1. Sid. 410. 1. Vent. 11. 1. Lev. 75. Raym. 14. 5. Mod. 310. 1. Salk. 1. 173. 6. Mod. 26. 106. 1. Lev. 54. 1. Sid. 410. 1. H. Bl. Rep. 50.

That

## Michaelmas Term, 21. Car. 2. In B. R.

That court, he said, was erected by letters patents within these two years; and the attornies of this court, being an ancient court, ought not to be excluded. THE CASE OF  
HASTINGS, AN  
ATTORNEY.

On the other side it was urged, that they had a certain number of attornies appointed by their charter, as there is at THE MARSHAL'S COURT.

KELYNGE, *Chief Justice*. This is a new court; and for my part, I think our attornies cannot be excluded. *Hastings* may bring his action. If a patent erecting a new court may limit a certain number of attornies who shall practise there, it may as well limit a certain number of counsel.

COLEMAN. They have so in THE MARSHALSEA and in London.

KELYNGE, *Chief Justice*. Their courts in London are ancient, and their customs confirmed by acts of parliament. The now court of THE MARSHALSEA is indeed a new-erected court (for the old court of THE VERGE was another thing); and as for their having a certain number of counsel or attornies, the question is the same with this before us, Whether they can legally exclude others? I do not see how the king, by a new patent, can oust any man of his privilege.

TWISDEN, *Justice*, said it was a \* new point, and that he had never heard it stirred before.—Afterwards being moved again, KELYNGE, *Chief Justice*, said, they should have their judgments quickly, if they stood upon it (a). \* [ 44 ]

(a) The Court directed *Hastings* to bring an action on the case against THE PROTHONOTARY of *Stepney Court* for refusing to record his appearance for his client. S. C. 1. Sid. 410.; but the question does not appear to have been determined. S. C. 2. Keb. 580.

### Anonymous.

### Case 63.

TWISDEN, *Justice*. I have known this ruled, If you say you will refer the cause to such a man, that *ex consequente* the cause must stay, because that man is made judge; and that the staying of the cause is implied in the reference. Proceedings shall be stayed on a cause being referred.

Ante, 20.  
2. Barnes, 53. 8. Mod. 170. 10. Mod. 205. 333.; but by 2. Ld. Ray. 789. no reference whatsoever shall stay proceedings, unless it be so expressed in the rule of reference.—See also 1. Crompton, 263. Impey, 571. and the statute 9. & 10. Will. 3. c. 15.

### The King against Vaws.

### Case 64.

MOVED to quash a presentment for refusing to be sworn constable of an hundred, because the presentment does not mention before whom the sessions were held, which was quashed accordingly; and TWISDEN, *Justice*, said, the clerk of the peace ought to be fined for returning such a presentment. A presentment for refusing to be sworn a constable must state before whom the  
sessions was held.—S. C. 2. Keb. 580. Cro. Eliz. 738. 5. Mod. 96. 129. Comb. 416. 1. Ld. Ray. 215. 638. 2. Ld. Raym. 1305. 1. Salk. 343. 2. Stra. 832. 865. 2. Hawk. P. C. 102. 320. 360. Dougl. 534. 2. Term Rep. 513.

Birrell

Michaelmas Term, 21. Car. 2. In B. R.

Cafe 65.

Birrell *against* Shaw.

**Plca to a *scire facias* against bail, tha. the principal had paid, must state the place where.** **SCIRE FACIAS** against the bail. The defendant pleads, that before the return of the writ of *scire facias*, there was a *capias ad satisfaciendum* against the principal, by virtue whereof he was taken, and paid the money; but alledges no place where the payment was.—TWISDEN, *Justice*. You cannot make good this fault.  
Ante, 19.  
2. Keb. 517. 2. Term Rep. 45. 576.

Cafe 66.

Dodwell and his Wife *against* Burford.

**In trespass, the Court will not increase the damages if the injury was consequential.** **TRESPASS.** The plaintiffs, in an action of battery, declared, that the defendant struck the horse whereon the wife rode, so that the horse ran away with her, whereby she was thrown down, and another horse ran over her, whereby she lost the use of two of her fingers.

3. C. 1. Sid. 431. The jury had given them forty-eight pounds damages, and they moved the Court upon view of the *mayhem* to increase them; whereupon the declaration was read.

3. C. 2. Danv. 451. But THE COURT thought the damages given by the jury sufficient (a).  
2. Lev. 172.  
1. Roll. Rep. 30.  
1. Ray. 739.  
Cro. Jac. 350. Cro. Car. 192. 11. Co. 5. 1. Ld. Ray. 38. 2. Stra. 872. 1083. Bull. N. P. 25.

(a) As to the increase of damages, 2. Willf. 248. 368. 374. 3. Willf. 1. Ld. Ray. 176. 1. Willf. 5. 62.

\* [ 25 ]

Cafe 67.

\* Smith *against* Bowin.

**An infant may maintain an action upon a contract made for his benefit, but he cannot be sued upon it himself.** **ACTION** upon a promise. The plaintiff declares, That the defendant, in consideration that the plaintiff would suffer him to take away so much of the plaintiff's grafts which the defendant had cut down, promised to pay him so much for it, and also to pay him six pounds which he owed him for a debt. After a verdict for the plaintiff,

WILLIAMS moved in arrest of judgment, that the plaintiff was *an infant*, and he not being bound by the agreement, that the defendant ought not to be bound by it neither.

3. C. 2. Keb. 581. KELYNGE, *Chief Justice*. If an infant let you a house, shall he not have an action against you for the rent?

77<sup>a</sup>. TWISDEN, *Justice*. I have known an action upon the case brought by an infant upon a promise to pay so much money, in consideration that he would permit the defendant to enjoy such a  
Cro. Car. 502. Co. Lit. 308. Godb. 364. Hob. 77. Noy, 92. 130. 4. Leon. 4. 1. Sid. 41. 446. 9. Mod. 103. 10. Mod. 26. 67. 85. 139. 12. Mod. 197. 243. Fitzg. 175. 276. 1. Peer. Wms. 558. 718. 734. 2. Peer. Wms. 244. 298. 519. (645.). 3. Peer. Wms. 208. Stra. 937. Ld. Ray. 443. 1. Atk. 146. Caf. Temp. King, 46. Powell on Contracts, 38. 1. Com. Dig. "Assumpst" (B. 14.). 3. Burr. 1794. Gilb. Law of Evid. 4th edit. 124. Cowp. 128. 1. Term Rep. 40. 643. 2. Term Rep. 159. 766. 2. H. Bl. Rep. C. B. 75

house:

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house : it was long insisted upon, that this was not a good consideration, because it is not reciprocal ; for the infant might avoid his promise if an action were grounded upon it against him : but it was adjudged to be a good consideration, and that the action was maintainable.

SMITH  
against  
BOWIN.

THE COURT, in the principal case, gave judgment for the plaintiff, *nisi. &c.*

### Bear against Bennett.

Case 68.

**T**WISDEN, *Justice*. When a man is arrested, and has lain in prison *three Terms*, and is discharged upon *common bail*, Whether shall the plaintiff ever hold the defendant to *special bail* afterward for the same cause, if he begins anew ?

A plaintiff must declare within *three Terms*, or the defendant shall be discharged on common bail.  
S. C. 2. Keb. 582.  
March, 157.  
Prac. Reg. 65.  
Cowp. 72. 128.

KELYNGE, *Chief Justice*. If he may, then may a man be kept in prison for ever at that rate.

At last it was agreed, that if he would pay the defendant his costs for lying so long in prison he should have special bail.

171. 3. Mod. 274. 1. Com. Dig. "Bail" (21.).

### Howard against the Chancellor of Salisbury.

Case 69.

**M**R. MASTERS moved for a *prohibition* to the spiritual court, to stay a suit there against a man for having married his wife's sister's daughter, alledging the marriage to be out of the Levitical degrees.—THE COURT. Take a *prohibition*, and demur to it ; for it is a case of moment.

A man may marry his wife's sister's daughter.  
Co. Lit. 235.  
2. Lev. 254.  
Ray. 464.

3. Lev. 364. 2. Jones, 118. 2. Vent. 9. Vaugh. 106. Ld. Ray. 68. Stra. 534

By 32. Hen. 8. c. 38. all persons not prohibited by the *Levitical degrees* may lawfully intermarry. Soon after making of the act Lord Cromwell applied for a dispensation for one Maffey, who was contracted to the *sister's daughter* of his late wife ; but the archbishop denied it, as contrary to the law of God ; for as it is expressed, that the *nephew shall not marry his uncle's wife*, it is implied, that the *niece shall not be married to the aunt's husband*. Gibson, 412, 413. In the case of Wortley v. Watkinson, Trin. 31. Car. 2. a consultation was awarded for the same reason upon the like proximity. 3. Keb. 660. 2. Lev. 254.

2. Jones, 118. 2. Shower, 70. acc. Cro. Eliz. 223. S. C. cont. Moor, 907. ; but in Easter Term, 3. Geo. 1. the court of common pleas refused to prohibit a suit in the spiritual court for marrying his wife's sister's daughter, although cases were quoted where such a marriage had been held lawful, Denny v. Ashwell, Stra. 53. ; and it has been also held, that the marrying of a *bastard*, who if legitimate would have been within the like degree, is illegal, Harris v. Jeffel, 1. Ld. Ray. 68. See 2. Burn's Ecc. Law, 434. and note (1), Co. Lit. 235. a.

\* [ 26 ]

### \* The King against Turnith.

Case 70.

**T**REVOR moved to quash an indictment upon 5. Eliz. c. 2. for exercising the trade of a grocer at *Chebbunt*, in *Hertfordshire*, not having served as an apprentice to it for seven years ;

The caption of an indictment on 5. Eliz. c. 2. must state it to have been found at the *quarter sessions*. Salk. 370. 2. Ld. Ray. 767. 1038. 1. Burr. 252.

years ;

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**THE KING** years ; because the statute says, they shall proceed at the *quarter*  
**against** sessions, and the word "*quarter*" is not in the indictment.—  
**TENNIS.** TWISDEN, *Justice*. That word "*quarter*" ought to be in.

The restraints of 5. Eliz. c. 2. do not extend to trades carried on in country villages. TWISDEN, *Justice*. And I believe the using of a trade in a country village as this is, is not within the statute.—MORETON, *Justice*, accorded.—RAINSFORD, *Justice*. It will be very prejudicial to corporations not to extend the statute to villages.—TWISDEN, *Justice*. I have heard all the Judges say, that they will never extend that statute farther than they needs must (a).  
S. C. 1. Vent. 51.  
S. C. 2. Keb. 583. 8. Co. 129. 11 Co. 84. 1. Salk. 373.

An indictment Further objection was made, That there wanted these words, qualified for "*ad tunc et ibidem onerati et jurati*;" for which all the three Judges, KELYNCE, *Chief Justice*, being absent, conceived it ought to be qualified.  
S. C. 2. Keb. 583. Cro. Eliz. 108. 6. Mod. 220. 2. Mod. 51. 10. Mod. 148.

(a) The same case in *Kebble* and *Ventris* agree, that country villages are not within the restraint of the act ; and this is confirmed by *Rex v. Langley*, 1. Sess. Cases, 183. 2. Bar. K. B. 225 : but *Ball v. Cohus*, 1. Burr. Rep. 366. and *Bull. N. P.* 192. *contra* ; though the Court said, that it had been the common practice to find for the defendant, on evidence that he followed the business only in a small village.

Case 71.

Moreton against Packman.

By the custom of London, a married woman may bring an addition as a *feme sole trader* without her husband. *Quare*, If the trade of a victualler be within this custom ?  
S. C. 2. Keb. 583.  
S. C. 2. Dan. 422.  
Lit. Rep. 31.  
Heti. 9.  
2. Brownl. 219.  
Cro. Eliz. 68.  
Moor, 135.  
8. Mod. 253.  
10. Mod. 6. 33.  
70.  
11. Mod. 253.  
1. Show. 183.

A CAUSE was removed out of London by *habeas corpus*, wherein the plaintiff had declared against the defendant as a *feme sole merchant*.

BARTUE moved for a *procedendo* ; because, he said, they could not declare against her here as a *feme sole*, for that she had a husband.

JONES, *contra*. The husband may then be joined with her, for he is not beyond sea.

TWISDEN, *Justice*. I think a *procedendo* must be granted for the cause alledged. It was resolved in *Langham v. Bewett*, in Cro. Car. 68. (though not reported by him), that if the wife use the same trade that her husband does she is not within the custom. And they are to determine the matter there, Whether this case be within their custom ? Perhaps a victualler (as this trade is) is not such a trade as their custom will warrant : and whether it will warrant it or not is in their judgment.—A *procedendo* was granted.

12. Mod. 603. Gilb. Eq. Rep. 83. Prec. Ch. 24. 328. 2. Vern. 104. 2. Peer. Wms. 144. 371. 451. 496.

1. Com. Dig. 544. 3. Burr. 1376. 1776. 3. Term Rep. 618. And see *Caudel v. Shaw*, 4. Term Rep. 361. where it is determined that a *feme covert* cannot sue without her husband as a *feme sole trader* by the custom of London in the superior courts at Westminster. See also the case of *Read v. Frances Jewson*, Hilary Term, 13. Geo. 3. there cited from a manuscript note by Mr. JUSTICE BULLER.

Tomlin

\* Tomlin *against* Fuller.

Cafe 72.

**A** SPECIAL ACTION ON THE CASE was brought for keeping a passage stopped up, so that the plaintiff could not come to cleanse his gutter.

HARDRES, after verdict for the plaintiff, moved in arrest of judgment, that there ought to have been a request for the opening of it.

BARWELL answered, It is true, where the nuisance is not by the party himself, there must be notice before the action brought; but in this case the wrong began in the defendant's own time.

TWIDEN, *Justice*. I know this hath been ruled: where a man made a lease of a house, with free liberty of ingress, &c. through part of the lessor's house, the lessor notwithstanding might shut up his doors, and was not bound to leave them open for his coming in at one or two of the clock at night, but he must keep good hours. And must the defendant in this case keep his gate always open expecting him? Wherefore it seems he ought to have laid a request. It is not good at the common law; and the defendant might well have demurred for that cause. Judgment for the plaintiff. It is aided by the verdict.

If a man have a right of way through another house, he cannot use it at unreasonable hours, nor bring an action for stopping the way, without notice and request to have it opened. S. C. 1. Vent. 43. S. C. 2. Keb. 575. 583. 1. Lev. 289. 5. Co. 101. Cro. Eliz. 395. Cro. Jac. 652. N. Lutw. 114. 135. 2. Salk. 457. 585. 6. Mod. 200. 260. 1. Ld. Ray. 713. 1. Ter. Rep. 560.

Butler *against* Play.

Cafe 73.

**U**PON a motion for a new trial in a cause where the matter was upon protesting a bill of exchange—SERJEANT MAYNARD said, the protest must be on the day that the money becomes due.—TWIDEN, *Justice*. It hath been ruled, that if a bill be denied to be paid, it must be protested in a reasonable time, and that is within a fortnight; but the debt is not lost by not doing it on the day (a).—A new trial was denied.

2. Salk. 644. 648. 653. 10. Mod. 37. 286. 294. 316. 12. Mod. 244. 309. 345. 1. Ld. Ray. 743. 2. Ld. Ray. 993. 1. Stra. 415. 508. 550. 707. 2. Stra. 829. 910. 1175. 1195. 1248.

A bill of exchange must be protested within a reasonable time. S. C. 2. Keb. 584. 1. Lev. 9. 41. 97. 124. 1. Ld. Ray. 743.

(a) Formerly what was the *reasonable time* in which the holder of an inland bill of exchange should give notice to the indorser of the non-acceptance and non-payment thereof, so as to prevent the indorser from being discharged by the laches of the holder, was considered as a question of fact for the determination of the jury. 1. Black. Rep. 1. 1. Ld. Raym. 744. 1. Stra. 415. 416. 550. 910. 1248. 1175. and the case of *Metcalf v. Hall, Beawes*, 482. Dougl. 515. But it is now settled, in the case of *Tindal v. Brown*, 1. Term Rep. 167. that this is a question of law for the opinion of the court. The rule now is, that when the drawee of an inland bill refuses to accept or pay, and the parties to whom notice is to be given reside at a different place from the holder and the drawee, the notice of non-acceptance or non-payment must be sent by the next post. Kyd's Treatise, 80. And when the party entitled to

notice resides in the same place, or at a place at a small distance from that in which the holder lives, the demand of payment must be made, and notice, in the case of non-payment, given, as soon as, under all the circumstances, it is possible to do. See Dougl. 515. 681. 1. Term Rep. 171. 714. 2. Term Rep. 713. In the notice to be given of the non-acceptance or non-payment of inland bills no particular form of words is necessary, but it is sufficient if it appear, that the holder means to give no credit to the acceptor, and to hold the drawer and the indorsers to their responsibility; but in foreign bills other formalities are required; for which see *Malyne*, 264. Ld. Ray. 743. *Beawes*, 460. Bull. N. P. 271. 1. Term Rep. 713.; the statutes 9. & 10. Will. 3. c. 17.; the 3. & 4. Ann. c. 9.; and Kyd's Treatise on Bills and Notes, page 87 to 102.

Cafe 74.

• Hughes *against* Underwood.

The *sealing* of a writ of error is a *superfedeas* to the execution, even though the writ varies from the record.

**K**ELYNGE, *Chief Justice*. The very *sealing* of the writ of error is a *superfedeas* to the execution.

TWISDEN, *Justice*. There was once a writ of error to remove the record of a judgment between such and such; but some of the parties names were left out: and by my brother WYLDE's advice, that writ not removing the record, they took out execution. But the Court was of opinion, that though the record was not removed thereby (of which yet, they said, he was not judge whether it was or not) yet that it so bound up the cause, that they could not take out execution. It is indeed good cause to quash the writ of error when it comes up, but execution cannot be taken out.

107. 197. 240. 272. 12. Mod. 398. 501. 1. Ld. Ray. 10. 47. 71. 405. 2. Ld. Ray. 896. 1295. 1. Stra. 632. 2. Stra. 867. 1186. 1. Barnes, 275. 2. Barnes, 164. 170. 2. Bac. Abr. 210. See the case of Jaques v. Nixon, 1. Term Rep. 279.

HILARY

# HILARY TERM,

The Twenty-First and Twenty-Second of  
Charles the Second.

IN

The King's Bench.

Monday, 24 January, 1670.

Sir John Kelynge, *Knt. Chief Justice,*

Sir John Twisden, *Knt.*

Sir William Moreton, *Knt.*

Sir Richard Rainsford, *Knt.*

} *Justices.*

Sir Jeoffry Palmer, *Knt. Attorney General.*

Sir Heneage Finch, *Knt. Solicitor General.*

\* [ 29 ]

- Jefferson, Executor of Jefferson, *against* Dawson Case 75.  
and Others.

IN a *scire facias* upon a recognizance in chancery entered into by one Garraway, there was a demurrer to part, and issue upon part. And the question was, Whether this Court could give judgment upon the demurrer?

JONES. The judgment upon the demurrer must be given in chancery. The court of chancery cannot try an issue, and therefore it is sent hither to be tried; but with the demurrer this court has nothing to do. Indeed, the books differ in case of an issue sent hither out of chancery, whether the judgment shall be here or there? *Keilway* says (a) it ought to be given here. *Lord Coke* says (b) it must be given in chancery: but none ever made it a question, Whether judgment upon a demurrer were to be given here or there? *Vide Coke's "Jurisdiction of Courts," fol. 80.*

If a *scire facias* be brought in the King's bench, on a recognizance in chancery, and there be a demurrer as to part, and an issue on a part, yet the King's bench shall give judgment upon the whole record.

S. C. 2. Saund. 23.

S. C. 1. Lev.

283. S. C. 1. Sid. 436. S. C. 2. Keb. 529. 584. 608. 621. 636. S. C. 3. Keb. 25. 31. 129.  
243. S. C. 1. Dav. 776. 1. Roll. 437. S. Co. 23. 1. Co. 157. 9. Co. 93. 1. Term  
Rep. 316.—(a) *Keilw.* 98. a.—(b) 4. Inst. 79. 88. 294.

SAUNDERS

Hilary Term, 21. & 22. Car. 2. In B. R.

**JEFFERSON, against DAWSON, AND OTHERS.** SAUNDERS *contra*. When there is a demurrer upon part, and issue upon part, the record being here, this Court ought to give judgment; because there can be but one execution.

KELYNGE, *Chief Justice*. If the record come hither entirely, we cannot send it back again: I cannot find any authority that the record should be removed from hence. He cited *Keilway* 941. 21. Hen. 7. 2. Co. 12. *Coke's Entries*, 678. 24. Ed. 3. fol. 65. There it is held, that judgment shall be given here upon a demurrer. Now if it must not be given here, there must be two executions for the same thing, or else they must lose half, for they can have but one *elegit*.

**Rex v. Fearnley.** At another day THE JUDGES gave their opinions severally, that judgment ought to be given in this court upon the whole record; for that it is an entire record, and the execution one: and if judgment were to be given there upon the demurrer, there must be two executions. And because the record shall not be remanded.

TWISDEN, *Justice*, said, the record itself was here, and that it had been so adjudged in *Holland's Case*, (a) and in *Dawkes v. Batter*: though \*my Lord Chief Baron, being then at the bar, urged strongly, that it was but the tenor of the record that was sent hither; and it is a maxim in law, that if a record be here once, it never goes out again; for that here it is *coram ipso rege*: so that if we do not give judgment here, there will be a failure of justice, because we cannot send the record back. The jury that tries the issue must assess the damages upon the demurrer. The record must not be split in this case.—Accordingly judgment was given here.

(a) 22. Edw. 4. pl. 23.

Case 76.

Willbraham *against* Snow.

A sheriff may maintain either *trover* or *trespass* for goods taken out of his possession after seizure by virtue of a *fieri facias*; for he has a special property in them after seizure; but in *trover* he can only recover the value of the goods; and not, as he may in *trespass*, damages for the tortious taking.

**TROVER AND CONVERSION.**—Upon issue *not guilty*, the jury find a special verdict, *viz.* That one *Talbot* recovered in an action of debt against one *Wimb*, and had a *fieri facias* directed to the sheriff of *Chester*; whereupon the sheriff took the goods into his possession; and that being in his possession, the defendant took them away, and converted them, &c.

The sole point was, Whether the possession which the sheriff has of goods by him levied upon an execution, is sufficient to enable him to bring an action of *trover*?

WINNINGTON. I conceive the action does not lie. An action of *trover* and *conversion* is an action in the right, and two things are to be proved in it, *viz.* a property in the plaintiff, and a conversion in the defendant. I confess, that in some cases, though the plaintiff have not the absolute property of the goods, yet as to the defendant's being a wrong-doer, he may have a sufficient. 8. C. 2. Saund. 47. S. C. 1. Sid. 438. S. C. 1. Vent. 52. S. C. 1. Lev. 282. S. C. 2. Keb. 588. 2. Saund. 47. 345. 438. Claryt. 113. 2. Mod. 245. Cro. Jac. 50. Cro. Car. 89. 2. Salk. 655. 6. Mod. 212. 291. 10. Mod. 21. 25. 37. 140. 1. Ld. Raym. 276. 736. 2. Stra. 996. 1. Stra. 128. 505. 1. Burr. Rep. 452. Bull. N. P. 33. 3. Willf. 332. 1. Term Rep. 75. 658.

cicat

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cient property to maintain the action against him. But I hold, WILLERHAH  
against  
SNOW. that in this case the property is not at all altered by the seizure of the goods upon a *feri facias*, for which he cited *Dyer* 98, 99; and *Ayre v. Aden*, *Yelv.* 44 (a). This case is somewhat like that of commissioners of bankrupts: they have power to sell, and grant, and assign; but they cannot bring an action: their assignees must bring all actions. It is true, a sheriff in this case may bring an action of trespass, because he has possession; but trover is grounded upon the right, and there must be a property in the plaintiff to support that; whereas the sheriff takes the goods by virtue of a naked authority: as when a man deviseth, that his executors shall sell his land, they have but a naked authority.

CURIA. The sheriff may well \* have an action of trover in this case. As for the case in *Yelv.* 44. there the sheriff seized upon a *feri facias*; then his office determined; then he sold the goods, and the defendant brought trover. And it was holden, that the property was in the defendant, by reason of the determining of the sheriff's office; and because a new *feri facias* must be taken out; for that a *venditioni exponas* cannot issue to the new sheriff. They compared this case to that of a carrier, who is accountable for the goods that he receives, and may have trover or trespass at his election. • [ 31 ]

TWISDEN, *Justice*, said, The commissioners of bankrupts might have an action of trover, if they did actually seize any goods of the bankrupts, as they might by law.

RAINSFORD, *Justice*, said, Let the property, after the seizure of goods upon an execution, remain in the defendant, or be transferred to the plaintiff, since the sheriff is answerable for them, and comes to the possession of them by law, it is reasonable that he should have an ample remedy to recover damages for the taking of them from him, as a carrier has that comes to the possession of goods by the delivery of the party.—MORETON, *Justice*, said, If goods are taken into the custody of a sheriff, and the defendant afterward become bankrupt, the statute of bankrupts shall not reach them; which proves the property not to be in the defendant.

TWISDEN, *Justice*. I know it hath been urged several times at the assizes, that a sheriff ought to have trespass and not trover; and counsel have pressed hard for a special verdict.

MORETON, *Justice*. My Lord Chief Justice BRAMPSTON said, he would never deny a special verdict while he lived, if counsel did desire it (b). Co. Lit. 155. b.  
(b) Judgment  
was given for  
the plaintiff.

(a) See S. C. Moer, 757. Cro. judged contrary to the report of it, Jac. 73. Dalton's Sheriff, 19. ad- *Yelv.* 44.

Case 77.

Gavell and his Wife *against* Berked.

To say, "You are a pimp, and a bawd, and fetch young gentlemen to young gentlemen," is actionable, without laying any special damage.

\* [ 32 ]

9. C. 1. Sid. 438.  
8. C. 1. Vent. 53.  
8. C. 2. Kcb. 639.  
2. Ro. Ab. 44.  
Cro. Eliz. 229.  
261.  
Cro. Car. 329.  
1. Ld. Ray. 710.  
2. Ld. Ray. 1004.  
2. Stra. 1169.  
6. Mod. 215.  
20. Mod. 385.  
22. Mod. 106.  
307. 344. 597.  
633.  
2. Term Rep. 473.

ACTION for words, viz. "You are a pimp and a bawd, and fetch young gentlemen to young gentlemen." Upon issue *not guilty*, there was a special verdict found.

JONES. The declaration says further, "whereby her husband did conceive an evil opinion of her, and refused to cohabit with her." But the jury not having found any such special damage, the question is, Whether the words in themselves are actionable, without any relation had to the damage alledged? I confess \* that to call one BAWD is not actionable; for that is a term of reproach used in scolding, and does not imply any act whereof the temporal courts take notice; for one may be said to be "a bawd" to herself. But where one is said to be a bawd in such actions as these, it is actionable. 27. Hen. 8. pl. 14. If one say, that another holds bawdry, it is actionable. So also in *Penfon v. Gooday*, Cro. Car. 329. "Thou keepest a whore in thy house to pull out my throat:" these words have been adjudged to be actionable; for that they express an act done; and so are special, and not general railing words. In the case of *Dimock v. Fawcett*, Cro. Car. 393 two Justices were of opinion, that the word "pimp" was actionable of itself. But I do not rely upon that, or the word "bawd," but taking the words all together, they explain one another. The latter words show the meaning of the former, viz. that her pimping and bawdry consisted in bringing young men and women together, and what she brought them together for is sufficiently expressed in the words "pimp" and "bawd," viz. that she brought them together to be naught: and that is such a slander as, if it be true, she may be indicted for it, and is punishable at the common law.

THE COURT was of the same opinion, and gave judgment for the plaintiff, *nisi*, &c.

Case 78.

Healy *against* Warde.

An *assumpsit* in an interior court to pay on request, the place of request must be stated, and alledged to be within the

jurisdiction of the Court.—S. C. 1. Vent. 2. S. C. 2. Kcb. 437. Post. 63. 1. Vent. 28. 74. 1. Lev. 50. 69. 96. 153. 2. Show. 430. 3. Lev. 243. 2. Lev. 87. 1. Saund. 74. 2. Mod. 30. 141. 197. 6. Mod. 224. See the case of *Rowland v. Veal*, Comp. 28. Trevor v. Wall. 1. Term Rep. 151.

ERROR of a judgment in *Hull*.—WESTON. The action is brought upon a promise, *cum inde requisitus foret*; and does not say, *cum inde requisitus foret infra jurisdictionem*.—TWISDEN, Justice. Though the agreement be general, *cum inde requisitus foret*, yet if he do request within the jurisdiction, it is good enough; and so it has been ruled.—And this error was disallowed.]

• Boswell, &c. Executors of Gibbs, *against* Coats. Case 79.

**T**WO several legacies are given by will to *Alice Coats* and *John Coats*. The executors deposit these legacies in a third person's hand for them, and take a bond of that third person, conditioned, that, "if the obligor at the request of      shall bring in *Alice* " and *John Coats*, when they shall come to their ages of twenty- " one years, to give such a release to the executors of *Francis* " *Gibbs* as they shall require, THEN, &c." One of the legatees comes of age, and during the minority of the other the bond is put in suit; and this whole matter is disclosed in the pleading.

A condition that the obligor shall procure a release for two several legacies, from two infants when they come of age, shall be taken *respectively* when each of them attain the age of twenty-one.

The question was, Whether the defendant was obliged to bring him in, to give a release, that was of age before the action brought, or might stay till both were of age before he procured a release from either?

S. C. 2. Keb. 591.  
S. C. 1. Vent. 58.

THE COURT was of opinion, that it must be taken *respectively*; and because it appears that the legacies were several, that several releases ought to be given, upon the reason of Justice *Wyndham's Case*, 5. Co. 7. (a); and *TWISDEN, Justice*, said, If there were no more in it than this, *scil.* "when they shall come to their ages of, &c." it were enough to have the condition understood *respectively*; for they cannot come to their ages at one and the same time.—And judgment was given accordingly.

1. Saund. 184.  
Cro. Jac. 295.  
1. Vern. 83.  
2. Vern. 478.

(\*) S. C. Noy, 6. Moor, 191. Jenk. 272.

Trethuny *against* Ackland.

Case 80.

Michaelmas Term, 21. Car. 2. Roll 218.

**T**WISDEN, *Justice*. If an executor plead several judgments, you may reply to every one of them, that they were obtained by fraud; or you may plead "*separalia judicia, &c. obtent. per fraudem*;" but in pleading *separalia judicia obtent. per fraudem*, if one be found to be a true debt, you are gone.

Pleading.  
S. C. 2. Saund. 48.  
S. C. 2. Keb. 591.  
Post. 175.

1. Lev. 281. 3. Lev. 115. 267. Vaugh. 94. 1. Vent. 199.

Parker *against* Welly.

Case 81.

Trinity Term, 21. Car. 2. Roll 1503.

**K**ELYNGE, *Chief Justice*, and *TWISDEN, Justice*. Notwithstanding the statute of 23. Hen. 6. c. 9. which obliges the sheriff to take bail, yet he can make no other return of a *capias* than either "*cepi corpus*," or "*non est inventus*;" for at the common law he could return nothing else; and the statute 23. Hen. 6. c. 9. though it compels him to take bail, does not alter the return; and so in a case of *Franklin v. Andrews* (b), it has been adjudged here.

The sheriff must return "*cepi corpus*," or "*non est inventus*," to a writ of *capias ad satisfaciendum*.  
S. C. post. 57.  
S. C. 2. Saund. 155.

S. C. 2. Keb. 607. 657. 2. Saund. 59.

Cafe 82.

\* Crofton's Cafe.

If a statute create a new offence, and inflict a penalty to be recovered by "bill, plaint, or information," yet an indictment will lie, except there be the negative words, "and not otherwise."

S.C. 1. Sid. 439.  
S.C. 1. Vent. 63.  
S. C. 2. Keb.  
595. 614.  
7. Co. 36.  
30. Co. 75.  
31. Co. 88.  
3. Ro. Ab. 106.  
2. Inst. 163.  
Cro. Jac. 577.  
4. Mod. 144.  
Carth. 263.  
1. Ld. Ray. 347.  
2. Ld. Ray. 991.  
2. Stra. 828.  
10. Mod. 336.  
12. Mod. 30.  
104. 117. 223.  
448. 502. 634.  
Fitzg. 47 65.  
1. Burr. 545.  
2. Burr. 803. 1229. 2. Hawk. P. C. 9. 302.

If a statute distribute a penalty to the king, the informer, and the

OFFLEY moved for a *certiorari* to the justices of the peace for *Middlesex*, to remove an indictment against one *Crofton*, upon the late statute 17. Car. 2. c. 2. made against nonconformist ministers coming within five miles of a corporation: the indictment was traversed. He urged, that by the statute no indictment will lie for such offence; for where an act of parliament enacts, that the penalty shall be recovered by bill, plaint, or information (as the statute upon which this indictment is grounded does), there an indictment will not lie; as in *Castle's Cafe*, Cro. Jac. 643.

TWISDEN, *Justice*. If the statute appoint, that the penalty shall be recovered by bill, plaint, &c. and not otherwise, there I confess an indictment will not lie; but without negative words I conceive it will, though the statute be introductive of a new law, and create an offence which was none at the common law: for whenever a thing is prohibited by a statute, if it be a public concern (a), an indictment lies upon it: and the giving other remedies, as by bill, plaint, &c. in affirmative words, shall not take away the general way of proceeding which the law appoints for all offences.

KELYNGE, *Chief Justice*, differed in opinion, and thought, that where a statute created a new offence and appointed other remedies, there could be no proceeding by way of indictment.

Afterward OFFLEY moved it again, and cited *Castle's Cafe*, Cro. Jac. 643. *Gadlow v. Whitecot*, Cro. Eliz. 544. MAGNA CHARTA 201 and 228.—Upon the second motion, KELYNGE came over to TWISDEN's opinion (b).

BUT IT WAS OBJECTED, that upon an indictment the poor of the parish would lose their part of the penalty: to which

(a) See *S. P. Rex v. Jones*, Mich. 14. Geo. 2.

(b) The reports of this case in *Keeble*, *Siderfin*, and *Ventris*, agree, that the Court refused to quash the indictment; but *Siderfin* adds, " *mei nota que eo fuit* " *ZACH. CROFTON'S Cafe*," and in the margin says, " *Quare per moy.* " In the case of *Rex v. Marriott*, 1. Show. 399. the determination of *Crofton's Cafe* is doubted; in *Rex v. Manning*, Fitzg. 47. the Court expressly deny it to be law; and in *Rex v. Wright*, 1. Burr. Rep. 543. LORD MANSFIELD says, that it had been denied many times:—The law upon this subject seems now to be, that where new offences are prohibited by a general prohibitory clause in a statute,

an indictment will lie. 1. Burr. 545. that if a statute prescribe a particular mode of punishing an old offence, such particular mode is cumulative, and does not take away the former remedy, 2. Burr. 799.; but that where a statute enacts, that the doing an act not punishable before shall for the future be punished in such and such a particular manner, then the common-law method by indictment cannot be pursued, 2. Burr. 805. 834.; for wherever a new offence is created by statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed. *Hartley v. Hooker*, Cowp. 524. See also *Cowp. 650.* 3. Term Rep. 442.

TWISDEN

## Hilary Term, 21. & 22. Car. 2. In B. R.

TWISDEN said, that he knew it to have been adjudged otherwise at *Serjeant's-Inn*; and that where a statute appoints the penalty to be divided into three parts; one to *the informer*, another to *the king*, and the third to *the poor*; that in such case where there is no informer, as upon an indictment, there the king shall have two parts, and the poor a third.

CROFTON'S  
CASE.

\* [ 35 ]

### • The King *against* Baker.

Case 83.

AN INDICTMENT in *Hull* for saying these words, *viz.* that "whenever a burghers of *Hull* comes to put on his gown, *Satan* enters into him."—LEVINZ moved, that these words would not bear an indictment.—KELYNGE, *Chief Justice*. The words are a scandal to Government.

Slandering a corporation is a scandal on the Government.

S. C. 2. Keb.

3. Mod. 139. 8. Mod. 270. 11. Mod. 166. 195. 12. Mod. 474. 1. Ld. Ray. 153. 2. Ld. Ray. 1029. 1369. Stra. 420. 617. 1152. 1168. Fort. 206. 2. Salk. 698. 1. Term Rep. 316.

594.

LEVINZ. The indictment concludes, "*in malum exemplum inhabitantium*;" whereas it should be, "*quamplurimorum subditorum domini Regis in tali casu delinquentium*."—And for this adjudged naught.

An indictment concluding, "to the evil example of the inhabitants," is bad. 10. Mod. 186.

### Anonymous.

Case 84.

TWISDEN, *Justice*. If the defendant in an action of debt for rent plead *nil debet*, he may give in evidence a suspension of the rent.

Evidence on *nil debet*.  
Post. 118.

### Amiles *against* Chambers.

Case 85.

A PARSON libels in the spiritual court against several of his parishioners for *tithe-turf*: they pray a prohibition. KELYNGE, *Chief Justice*. Turf, gravel, and chalk, are part of the freehold, and not tithable.

Turf is not tithable.  
2. Inst. 651.

THE COURT granted one prohibition to all the libels; but ordered the plaintiffs to declare severally.

Prohibition.  
S. C. 2. Keb. 596.

March, 58. 94. Yelv. 128. 2. Mod. 77. 12. Mod. 47. 2. Vern. 46. 1. Ld. Ray. 187. Abr. Eq. 366.

### Maleverer, late Sheriff of York, *against* Redshaw.

Case 86.

Trinity Term, 21. Car. 2. Roll 1511.

DEBT upon a bond of forty pounds: the condition was, for appearing at a certain day; concluding, that if the party appeared, then the condition to be void. The defendant pleaded the statute 23. Hen. 6. c. 9. "*ditto* to be void;" is good; for the latter words shall be rejected as surplusage.—S. C. 1. Sid. 456. S. C. 2. Saund. 78. S. C. 1. Vent. 39. S. C. 2. Keb. 536. 596. 625. Hob. 14. 1. Ld. Ray. 38. 1. Will. 351.

A Sheriff's bond conditioned, "that if the party appear, then the con-

## Hilary Term, 21. & 22. Car. 2. In B. R.

**MALLEYER**  
against  
**REDSHAW.**

**COLEMAN.** The bond is void by the express words of the statute, being taken in other form than the statute prescribes.

**KELYNGE, Chief Justice.** If the condition of a bond be, "that if the obligor pay so much money, then the condition to be void," in that case the bond is absolute,

[ 36 ]

**TWISDEN, Justice.** I have heard **LORD HOBART** say upon this occasion, that because the statute would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added, "that bonds taken in any other form should be void:" for, said he, the statute is like a *tyrant*; where he comes he makes all void; but the common law is like a *nursing father*, makes void only that \* part where the fault is, and preserves the rest.

**KELYNGE, Chief Justice.** If the condition had been, "that the party should appear," and had gone no farther, it would then have been well enough.

**TWISDEN, Justice.** Then why may not that which follows be rejected, as idle, and surplusage?—*Cur. advisare vult (a).*

(a) By the 23. Hen. 6. c. 9. no sheriffs, &c. shall take any obligation of persons in their custody but only to themselves, by the name of their office; and upon condition written, that the said prisoner shall appear at the day and in the place appointed by the writ; and concludes, that if they take any obligation in other form it shall be void. The objection in this case was, that the bond made the condition, instead of the obligation, void, and therefore was not in the form

prescribed by the statute; for that although the obligor appeared at the day, yet the condition only being made void by that appearance, the bond would remain single and in force. But **THE COURT** were of opinion, that the bond was good; for that the words "then" "this obligation to be void" might be rejected as surplusage; and judgment was accordingly given for the plaintiff. S. C. 2. Saund. 78. S. C. 1. Sid. 456.

### Cafe 87,

### Jones against Trefilian.

To assault and battery the defendant may plead it was in defence of his possession; but if he says,

*molliter insultum fecit* instead of *molliter manus*

*imposuit*, it is bad on demurres.

S. C. 1. Sid. 441.

S. C. 1. Lev. 282.

S. C. 2. Keb. 597.

S. Ro. Ab. 548.

N. Lutw. 287.

470. 481.

21. Mod. 229.

1. Ld. Ray. 62.

Lutw. 1483.

**A**N action of trespass of assault and battery. The defendant pleads, *son assault demesne*. The plaintiff replies, that the defendant would have forced his horse from him, whereby he did *molliter insultum facere* upon the defendant in defence of his possession. To this the defendant demurred.

**MORETON, Justice.** *Molliter insultum facere* is a contradiction. Suppose you had said, that *molliter* you struck him down.

**TWISDEN, Justice.** You cannot justify the beating of a man in defence of your possession, but you may say that you did *molliter manus imponere*, &c.

**KELYNGE, Chief Justice.** You ought to have replied, that you did *molliter manus imponere, quæ est eadem transgressio*.

**THE COURT.** *Querens nil capiat per billam*, unless better cause be shown this Term.

Leach

Hilary Term, 21. & 22. Car. 2. In B. R.

Leach *against* Morris, Executor of Adams.

Cafe 88.

Michaelmas Term, 21. Car. 2. Roll 619.

IN an action of debt for not performing an award, the plaintiff declares, that *inter alia arbitratum fuit, &c.* TWISDEN, *Justice.* That is naught (a).

A declaration in DEBT, that *inter alia* it was awarded, is bad.

S. C. 2. Keb. 601. 623. 659. 1 Lev. 292. 1. Sid. 161. Comyns, 328. 547. 2. Peer. Wms. 450. 3. Peer. Wms. 187. 190. 361.

(a) It is said 2. Keb. 601. that judgment on demurrer was given for the plaintiff. And see Litt. 312. Comyn's Dig. "Arbitrament," (I 2.) and (I 5.) Kyd on Awards, page 198. and 1. Burr. Rep. 280.

Jackson and Crisp *against* the Mayor of Berwick.

Cafe 89.

Trinity Term, 20. Car. 2. Roll

AN action of covenant is brought against the mayor, burgesses, and corporation of *Berwick* upon an indenture of demise, wherein the plaintiffs declare, that the defendants did demise to them a house in *Berwick* with a covenant, that the plaintiffs should enjoy the same without interruption by them, or any other person or persons \* whatsoever; and alledge, that a stranger claiming a title did make an entry upon them, and kept them out of possession. The defendants plead a local plea; *to wit*, that the said stranger did not enter upon the plaintiffs, &c.; upon which issue is joined. The plaintiffs then make a *suggestion*, and pray a *venire facias* into the next county: upon which there is a trial.

In covenant on lease dated at York, of lands in *Berwick*, and issue joined on a breach assigned in *Berwick*, the plaintiff, on a suggestion that *Berwick* is in Scotland, may change the venue to the next adjoining English county.

JONES conceived this to be a *mis-trial*, and that the *venire* ought to have been *de vicineto* of the castle of *York*, where the covenant is alledged to have been made.—FIRST, this fault is not aided by any of the statutes of jeofails; not by the last and greatest of all: that aids where the *venire facias* is awarded from another place than it ought to be, but not when awarded from another county (a); which is my exception. That, at the common law, this *venire facias* is not well awarded, I rely upon *Dowdale's Case*, 6. Co. 46. If an action be brought upon a matter done out of the kingdom, the trial will be where the action is laid. In our case, the action is grounded upon an indenture supposed to be made within the county of *York*; but issue is joined upon a matter done out of the kingdom, for so *Berwick* is. This issue, I conceive, ought to be tried where the action is laid. It is true, in the case of *Wales*, the law is otherwise; for I find, that *Wales* is parcel of the

(a) The 16. & 17. Car. 2. c. 8. 1. 2. Lev. 164. 1. Com. Dig. "Amendment" (H 3.) and see 1. Vent. 58. 90. 1. Sid. 381.

## Hilary Term, 21. & 22. Car. 2. In B. R.

**JACKSON AND CHIEF** realm of *England*, though the king's writs do not run there. But *Berwick* is part of the realm of *Scotland*, and was conquered by king *Edward the Fourth*, and acts of parliament name *Berwick*.  
**against** king *Edward the Fourth*, and acts of parliament name *Berwick*.  
**THE MAYOR** When *Calais* was in possession of the kings of *England*, and a mat-  
**OF BERWICK.** ter arising within *Calais* came in issue, was ever any *venire facias* awarded to *Dover*?

**TWISDEN, Justice.** There are two precedents of such trials, one in 12. *Eliz. Roll.* 630. and in 2. *Roll.* 97. I have asked my brother **WITHRINGTON**, who is a knowing man, how it came to pass that *Berwick* was put into acts of parliament? He said, he knew no other reason than that the Recorder of *Berwick* was at first in parliament and desired it, and therefore it hath continued ever since, — **MR. WESTON** said, that the case of *Shirley v. Sackrel, Cro. Eliz.* 465. was an authority (a).

(a) In Trinity Term 22. Car. 2. county, 1. Vent. 90. and judgment was the Court was of opinion, that the ultimately given for the plaintiff. Ray. *venire* was well awarded to the adjoining 174. 1. Lev. 252.

The delay of the Court in giving judgment shall not operate to the prejudice of the parties. In this case it happened, that during the *Cur. advisare vult*, one of the plaintiffs died; and the question was, What should be done? — **TWISDEN, Justice.** There is a case in *Latch.* 92. wherein this difference is taken, viz. If there be no continuance entered, you may enter the judgment as at the *day in bank*: but if continuances are entered, \* then you cannot go back, but must enter the judgment to the time of the continuances. — It was put off for counsel to be heard in it (b).

\* [ 38 ]

12. Mod. 130.  
Comyns, 31.

1. Ld. Ray. 695. 2. Ld. Ray. 849. 869. Stra. 1081. Burr. 2177.

(b) THE COURT was of opinion, the *posca*, 1. Vent. 90.; for that it that there being no continuances the judgment ought to be entered as if it had been immediately given on the return of the Court should prejudice the plaintiff. 1. Sid. 462.

Case 90.

Smith against Wheeler.

Easter Term, 20. Car. 2. Roll 570.

A king's counsel cannot plead against the Crown.

3. Bl. Com. 26. 28.

**SERJEANT MAYNARD** was about to argue in this case, that the residue of the term was not forfeited to the king.

**KELYNCE, Chief Justice.** BROTHER MAYNARD, you would do well to be advised, whether or no you, being of the king's counsel, ought to argue in this case against the king?

**MAYNARD** answered, that the king's counsel would have but little to do, if they should be excluded in such cases; and that **SERJEANT CREW** argued *Haviland's Case*, in which there was the like question.

**TWISDEN, Justice.** In *Stone v. Newman*, I know the king's counsel did argue against estates coming to the Crown: but if MY  
**LORD**

Hilary Term, 21. & 22. Car. 2. In B. R.

LORD thinks it not proper, my BROTHER MAYNARD may give his argument to some gentleman at the bar to deliver for him.

SMITH  
against  
WHEELER.

Afterwards, in *Easter Term 22. Car. 2. 1670*, the case came to be argued again.—JONES argued *for the plaintiff* in the writ of error:—FIRST, Whether this settlement be fraudulent or no? That fraud is not to be presumed, he cited the *Chancellor of Oxford's Case*, 10. Co. 54. and the *Case of Crispe v. Pratt*, Cro. Car. 550. But for THE SECOND POINT, he held, that here is a trust forfeitable to the king; and he quoted *Sir John Dacomb's Case*, Cro. Jac. 512. That the trust in this case is forfeited, he proved from the nature of a trust, which is an equitable interest, or a right of perception of the profits of an estate: the *cestui que trust* hath *jus habendi, et jus disponendi*. And though he that hath a trust, hath in law neither *jus in re*, nor *jus ad rem*, yet in equity he hath both. In equity, whatever I have a right to dispose of, I have a right to take the profits of. For if a man make a conveyance to the use of one and his heirs, in trust, that he shall convey over, though it is not expressed that he shall take the profits, yet he shall take them. Now in the second proviso there is a double expression; one that amounts to a revocation, the other amounting to a disposition or limitation. Now he that hath a power of disposition, hath a right that may be forfeited: and therefore the *Duke of Norfolk's Case* comes not to this, for we are not in the power of \* revocation; I decline that, but we are in a power of disposition. Now this is good by way of trust. In law indeed such a proviso is naught, but in a trust the intention of the parties carries it. I observe in forfeitures at the common law, where a man hath only *jus disponendi*, though he hath no estate, yet he may forfeit it, *Pla. Com.* 260. A man is possessed of a term in the right of his wife, though he hath no estate himself, yet he may forfeit it: and the reason is, because he hath *jus disponendi*. If a man might by such a disposition as this protect his estate from being forfeited, little land would come to the Crown upon attainders. There are two badges of ownership: the one is a perception of the profits, the other a power of disposing; both which are in our case; and a favourable construction ought not to be put upon a deed for encouragement of traitors.

A. being possessed of a term for eighty years, assigns part of the premises, and settles the residue in trust on himself for life, with divers remainders over; provided, that if he had issue the trusts should cease, and the assignment be in trust for such issue, with a power of revocation. If A. commit treason, the remainder of the original term is only forfeited during his life.

\* [ 39 ]  
S. C. Ante, 16.  
S. C. 1. Freeman.  
9.  
S. C. 1. Vent.  
128.  
S. C. 1. Lev.  
279.  
S. C. 2. Keb.  
564. 608. 644.  
763. 772.  
2. Inst. 216.  
9. Co. 121.  
1. And. 294.  
Lane, 54. 113.  
Hard. 466.  
Raym. 120.  
1. Roll. Abr.  
343.  
2. Ro. Ab. 34.  
March. 45. 88.  
1. Sid. 260.  
2. Hawk. P. C.  
639.  
10. Mod. 116.  
120. 359. 361.  
367. 415.

WINNINGTON *contra*. As for THE FIRST POINT, the fraud ought to be found; and this lease was made long before the attainder, or the treason committed.—For THE SECOND POINT, the question will be, What our law calls a trust? then I shall examine, Whether there was such a thing in *Mayne* at the time of his decease? A trust I find to be a confidence reposed in the person, that another shall take the profits, and that the trustee shall convey according to his directions: this I gather from these books, viz. *Plowd.* 352. *Delamere's Case*, 1. Co. 121, 122. *Co. Lit.* 272. Now if these two qualities, or either, shall fail in this case, then *Simon Mayne* had no trust to forfeit, for that the case will depend upon

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upon the true stating the words of the deed. For the first proviso, it doth not cohere with any of these qualities; for by virtue of that proviso he could not be said to have any right: he hath no *jus disponendi* but upon contingencies. If he hath no children, he hath no such power; nay, if he have children, they must be living at his death. Further, by these provisos, if the contingencies do happen, he hath but a power to declare the uses; he hath no interest in him at all: *Litt. sect. 463*. It is one thing to have a power or possibility of limiting an interest; another to have an interest vested. 7. Co. 11. and *Moor's Rep.* 366. about the delivery of a ring; where they hold, that if it had been to have been done with his own hand, it had not been forfeited. The Case of *Sir Edward Clere* is different from ours; for if a man make a feoffment to the use of his last will, or to the use of such persons as shall be appointed by \* his last will; in this case he remains a perfect owner of the land. But if a man make a conveyance, reserving a power to make leases, or to make an estate to pay debts, he hath here no interest, but a naked power. The *Duke of Norfolk's Case* (a) is full in the point: a conveyance to the use of himself for life, the remainder to his son in tail, with power to revoke under hand and seal, was adjudged not forfeited; and yet he had a power to declare his mind, as in our case.—*Paget's Case*, *Moor* 193, 194.

\* [ 40 ]

- (a) 7. Co. 13. 2.  
Poph. 18.  
1. And. 293.  
*Moor*, 303.  
4. Leon. 135.  
*Palm.* 433.  
1. Hale, 245.  
2. Hawk. P. C.  
643.

KELYNGE, *Chief Justice*. If this way be taken, a man may commit treason pretty cheaply.

TWISDEN, *Justice*. Whoever hath a power of revocation, hath a power of limitation. The reason is, because else the feoffees would be seised to their own use: *Sir William Shelley's Case* (b). There is no difference betwixt the *Duke of Norfolk's Case* and this; only here it is under his hand-writing, and there under his proper hand-writing.

(b) Latch. 102.

Afterward, in *Easter Term*, 23. Car. 2. 1671, THE COURT delivered their opinions (HALE being then *Chief Justice*).

MORETON, *Justice*. I conceive the judgment in the common pleas is well given. As for the FIRST POINT, whether this conveyance made by *Sir Simon Mayne* be fraudulent or not, the counsel themselves have declined it, and therefore I shall say nothing to it. For THE SECOND, I conceive no larger interest is forfeited than during the life of the father. If it be objected, that the father had by this proviso *jus disponendi*; I answer, It is true, he had a power, if he had been minded so to do, but it was not his mind and will. Now *animus hominis est ipse homo*; but he must not only be minded so to do, but he must declare his pleasure.—HOBART saith (c), If a man will create a power to himself, and impose a condition or qualification for the execution of it, it must be observed. Now here is a personal and individual power seated in the heart of a man. And it seems to me a stronger case than that

- (c) In the case of  
*Kibbet v. Lee*,  
*Hob.* 312.

of

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of the *Duke of Norfolk* (a) put in *Englefield's Case* (b), where yet the condition was not given to the king by the statute of 26. *Hen.* 8. c. 13. f. 5. There was a later case adjudged of *Warner v. Hynde* (c); a case that walked through all the courts in Westminster-hall, there, by reason of the *ipso declarante*, it could not be forfeited.

SMITH  
against  
WHEELER.  
(a) 7. Co. 13.  
Poph. 18.  
Moor 303.  
(b) 7. Co. 12.  
2. Keb. 566.  
1. Lev. 279.  
(c) Latch. 69.  
102.

RAINSFORD, *Justice*. I hold it is not forfeited. My reason is, Because THE PROVISIO is at an end and determined; for when he died and no will, there is an end of THE \*PROVISIO. The altering of the old trust is to be done by *Sir Simon Mayne*, and it is inseparable from his person: nothing can be more inseparable than a man's will. *Moore* 193.

\* [ 41 ]

TWISDEN, *Justice*. I am of the same opinion.

HALE, *Chief Justice*, was of the same opinion, That nothing was forfeited but during *Sir Simon's* life. THE PROVISIO, he said, did not create a trust, but *potestatem disponendi*, which is not a trust. He said, he did not understand the difference between the *Duke of Norfolk's Case* and this,—Accordingly the judgment was affirmed (d).

(d) By 7. Ann. c. 21. and 17. Geo. 2. c. 29. no attainder of high treason shall extend to the disinheriting of any heir, nor to prejudice the right and title of any persons, other than the right and title of the offender during his natural life, after the death of the Pretender and his sons. James the Second married a princess of the house of Modena, and died at St. Germain's 17 September 1701, leaving one son, James Francis, who married Maria Clementina Sobiesky,

grand-daughter to the King of Poland, and died in the year 1765, leaving two sons, *viz.* Charles Edward Lewis Casimir Stuart, Count of Albany; and Henry Benedict Stuart, Cardinal of York. The Count of Albany married a Princess of Stolberg, in Germany, and died at Rome 31 December, 1788, leaving only a natural daughter, whom he had created Duchess of Albany. The cardinal of York was born at Rome on the 6 March, 1725; and is still alive and unmarried.

## Aston's Case.

## Case 91.

IN a cause wherein one *Aston* was attorney—KELYNGE, *Chief Justice*, said, that a man may discontinue his action here, before an action brought in the common pleas: but if he do begin there, and then they plead another action depending here, and then they discontinue, I take it, the attorney ought to be committed for this practice.—TWISDEN, *Justice*. When I was at the bar, error was brought, and infancy assigned, when the man was thirty years old; and the attorney was threatened to be turned out of THE ROLL.

If an attorney discontinue an action after having pleaded it as depending, or assign infancy for error when the party is adult, he shall be struck off THE ROLL.

1. Sid. 84. 306. 1. Lev. 227. 298. 2. Lev. 118. 194. 1. Saund. 23. 2. Saund. 74. Ante, 13. 2. Danb. 156. Nelf. Lut. 91. 10. Mod. 228. 325. 2. Ld. Ray. 1014. 1. Barnes, 110. 1. Salk. 515. 1. Com. Dig. "Attorney" (B 14.). Cowp. 829.

The

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Cafe 92.

The Cafe of Adrian Lampriere and Others.

THE KING is intitled to a *certiorari* as a matter of right; but if the appeal be made by a subject, it is matter of discretion.

SERJEANT NEWDIGATE moved for a *certiorari* to remove an indictment hither from *Bedford*, against several Frenchmen for robbery.

KELYNGE, *Chief Justice*. Will it remove the recognizances there to appear?

TWISDEN, *Justice*. I never knew such a motion made by any but the king's attorney or solicitor.

S.C. 1. Vent. 63.  
10. Mod. 205.  
278.  
12. Mod. 390.  
403. 601. 645.  
1. Ld. Ray. 216.  
469. 530. 609.  
2. Ld. Ray. 971.  
1203. 1515. 2.

RAINSFORD, *Justice*. There is no indictment yet before a Judge of assize.

KELYNGE, *Chief Justice*. You may have a *certiorari*, but it must not be delivered till the indictment be found; and then the Judge hath the prosecutors there, and may bind them over hither, and so the trial may be here.

Burr. 861. 4. Burr. 2456. Cowp. 78. 283. 2. Hawk. P.C. 407. Dougl. 419.

Cafe 93.

Anonymous.

In what cases a view shall be granted.

KELYNGE, *Chief Justice*. A jury was never ordered to a view before their appearance, unless in an *assise*.—TWISDEN, *Justice*. Neither shall you have it here but by consent (a).

(a) But now by 4. Ann. c. 16. f. 8.  
“ In any action brought at Westminster,  
“ where it shall appear necessary that  
“ the jurors should have a view of the  
“ messuages, lands, or place in question,  
“ in order to their better understanding  
“ the evidence, the Court may order a  
“ special writ of *distringas* or *habeas corpus*  
“ to issue, by which the sheriff  
“ shall be commanded to have six out  
“ of the first twelve of the jurors nam-

ed in such writ, or some greater number of them, at the place in question,  
“ some convenient time before the trial, who  
“ shall have the matters in question shewn  
“ to them, by two persons in the said  
“ writ named, to be appointed by the  
“ Court; and said sheriff shall, by a  
“ special return certify, that the view  
“ hath been had according to the command of the writ.”

\* [ 42 ]

Cafe 94.

\* *Nosworthy against Wyldeman.*

In *assumpsit* for money had and received by the defendant for the plaintiff to the use of the defendant, the Court, after verdict, will reject the latter words as repugnant.

THE plaintiff declares in an *indebitatus assumpsit*, That the defendant was indebted to him in fifty pounds for so much money received of the plaintiff by one *Thomas Buckner*, by the appointment and to the use of the defendant.

After a verdict for the plaintiff—WINNINGTON moved in arrest of judgment, that the plaintiff could not have an action for money received by the defendant to the use of the defendant.

But because it might be money lent, which the defendant received to his own use, though he was to make good the value to the plaintiff, the Court will presume after a verdict, that it appeared so to the jury at the trial. For where a declaration will bear two constructions, and one will make it good, and the other bad, the Court after a verdict will take it in the better sense.—And accordingly the plaintiff had judgment.

S.C. 2. Keb. 615.  
1. Roll. Abr.  
111. pl. 4.  
Cro. Jac. 690.  
10. Mod. 145.  
185. 210. 230.  
200.  
8. Mod. 240.  
32. Mod. 495. 510. 11. Mod. 48. 241. 273. 1. Ld. Ray. 669. 2. Ld. Ray. 1223. 1517.  
1. Sura. 551. 2. Sura. 1011. Salk. 213. Dougl. 5. 667.

Williams

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Williams *against* Lee.

Cafe 95.

**A**N ACTION OF ACCOUNT.—It was prayed, that the Court would give further day for giving the account, the matter being referred to auditors.—TWISDEN, *Justice*. The auditors themselves must give further day.—KELYNGE, *Chief Justice*. The auditors are judges whether there be a voluntary delay or not. If they find the parties remiss and negligent, they must certify to the Court that they will not account.

1. Brownl. 24. 1. Danv. 231. F. N. B. 116. Co. Lit. 90. 3. Bl. Com. 163. and see the Statutes Westm. 2. c. 11. and the 4. Ann. c. 16.

On a writ of account the auditors are the proper judges as to enlarging the time.  
Post. 65.  
2. Inft. 380.

Roberts *against* Mariott.

Cafe 96.

Trinity Term, 22. Car. 2. Roll 944.

**M**OVED to discontinue an action of debt upon a bond.—KELYNGE, *Chief Justice*. We will not favour conditions. RULED, that the other side should shew cause why they should not discontinue.

S. C. post. 239.

S. C. 2. Keb. 614. 618. 702. S. C. 2. Saund. 73. 188. S. C. 1. Lev. 300. 333.

The bond in this case was conditioned for the performance of an award, *ita quod* the award be ready to be delivered on the first of May. After *oyer*, and no award pleaded, the plaintiff in his replication, shewing the award and the breach thereof, mistook the day, and averred, that the award was ready to be delivered

on the *twentieth* of May. After demurrer, and judgment *nisi* for the plaintiff, the defendant shewed this mistake. But the Court, on the prayer of the plaintiff, gave him leave to discontinue the action on payment of costs. 2. Saund. 74. See vide S. C. post. 239.

\* [ 43 ]

\* Buckley *against* Turner.

Cafe 97.

**A**CTION UPON THE CASE upon a promise. The case was, That *Edward Turner*, brother to the defendant, was indebted to the plaintiff for a quarter's rent; and the defendant, in consideration that the plaintiff *mitteret prosequi prædict. Edwardum Turner* (so the words are in the declaration), promised to pay the money (a).

A promise to pay the debt of another, in consideration that the plaintiff, *mitteret prosequi*, is sufficiently certain.

After a verdict for the plaintiff it was moved in arrest of judgment, that here is not any consideration; for there is no loss to the plaintiff in *sending* to prosecute, &c. nor any benefit, but a disadvantage to the party that owed the money: besides, there is an uncertainty whether, or to whom he should send.

S. C. 1. Sid. 446.  
S. C. 2. Keb. 618. 624.  
Ante, 12, 13.  
Post. 166. 169.  
284.

TWISDEN. *Mittere prosequi* is well enough; for the plaintiff must be at charge in it.

1. Ro. Abr. 24.  
10. Mod. 296.  
331.

KELYNGE, *Chief Justice*. Certainly it ought to have been *omitteret*; and if it be so in the Office-book we will mend it.

1. Ld. Ray. 358. 368.  
2. Ld. Ray.

735. 759. 1087. 1. Stra. 94. 592. 2. Stra. 933. 1027. Comyns, 115. 148. "Assumpit" (A 3.).

1. Com. Dig.

(a) See 29. Car. 2. c. 3.

TWISDEN

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BUCKLY  
against  
TURNER.

TWISDEN, *Justice*. This being after a verdict, if you mend it, they must have a new trial; for then it becomes another promise.

JONES moved for judgment, and said he found the word *mitto* did signify to *send, forbear, cease, or let alone*; as *mitte me quæso*, "I pray let me alone," in *TERENCE*; and in the Latin and English dictionary it hath the sense of forbearing.

KELYNGE, *Chief Justice*. I think the consideration not good, unless the word *mitto* will admit of that sense: if it have a propriety of sense to signify *forbear*, in reference to things as well as persons, it will be well. Whereupon the dictionary being brought, it was found to bear that sense. And TWISDEN, *Justice*, said, If a word will bear divers senses, the best ought to be taken after a verdict.—*PER CURIAM*, Let the plaintiff take his judgment.

Case 98.

Richards against Hodges.

Trinity Term, 21. Car. 2. Roll 882.

To debt on bond to save harmless, and non damnificatus pleaded, if the plaintiff state the payment in damage, and the defendant rejoins that he tendered the money, and that the plaintiff paid it *de injuriâ sua propriâ*, it is a DEPARTURE.

\* [ 44 ]

S. C. 2. Saund. 83.  
S. C. 1. Sid. 444.  
S. C. 2. Keb. 612. 619.  
Comyns, 553.  
1. Saund. 116.  
1. Willc. 334.  
Stra. 422.  
1. H. Bl. Rep. 253.  
Co. Lit. 304. 2. 12. Mod. 54. 92. 10. Mod. 251. 257. 349. 1. Ld. Ray. 30. 76. 234. 693.  
2. Ld. Ray. 1449. See Mr. Const's edit. of Bott's Poor Laws, 1st vol. page 403.

DEBT upon a bond. The condition was to save a parish harmless from the charge of a bastard-child. The defendant pleaded "*non damnificatus*." The plaintiff replies, that the parish laid out three shillings for keeping the child. The defendant rejoins, that he tendered the money; and the plaintiff paid it *de injuriâ suâ propriâ*: whereupon it was demurred.

The question was, Whether this rejoinder were a departure or no from the bar?

SAUNDERS. It is a good rejoinder; for in our bar we say, that the parish is not damnified, that is, not damnified within the intent of the condition. If I am to save a man harmless, and he will voluntarily run himself into trouble, the condition of my bond is not broken: and so our rejoinder is pursuant to our bar, and shows, that there is no such damnification as can charge us.

TWISDEN, *Justice*. The rejoinder is a *departure*: as in an action of covenant for payment of rent, if the defendant pleads performance, and the plaintiff reply, that the rent is unpaid; for the defendant to rejoin that it was never demanded is a departure. You should have pleaded thus, *viz.* that *non fuit damnificatus*, till such a time, and that then you offered to take care of the child, and tendered, &c.—Judgment for the plaintiff, *nisi, &c.*

Case 99. Smith, Lluellyn, and Others Commissioners of Sewers.

An attachment lies against commissioners

THEY were brought into court by *attachment*, because they proceeded to fine a person after a *certiorari* delivered.

of sewers for imposing a fine after a *certiorari* delivered.—S. C. 1. Lev. 288. S. C. 1. Vent. 66. S. C. 2. Keb. 635. S. C. Raym. 186. 1. Sid. 78. 1. Salk. 201. Cro. Eliz. 915. Cro. Jac. 336. 2. Mod. 331. 5. Mod. 314. 2. Hawk. P. C. 229. Bunb. 61. Stra. 1263.

TWISDEN,

Hilary Term, 21. & 22. Car. 2. In B. R.

TWISDEN, *Justice*. Sir Anthony Mildmay was a commissioner of sewers, and for not obeying a *certiorari* was indicted of a *præmunire*, and was fain to get the king's pardon (a). And I have known, that upon an unmannerly receipt of a prohibition, they have been bound to the good behaviour.

SMITH,  
LLUELLYN,  
AND OTHERS,  
COMMISSIONERS OF  
SEWERS,

KELYNCE, *Chief Justice*. When there are informations exhibited against you, and you are fined a thousand pounds, a man which is less than it was in king Edward the Third's time (for then a thousand pound was a great deal more than it is now), you will find what it is to disobey the king's writ.

Afterwards they appeared again, and COLEMAN said, the first writ was only to remove presentments; the second to remove orders; and we have made two returns, the one of presentments, the other of orders: a general writ might have had a general return.

The 13. Eliz. c. 9. which makes the orders of commissioners of sewers binding without the royal assent, and enacts, that they shall not be reversed but by other commissioners, doth not thereby restrain the Court of King's Bench, or oust it of its general jurisdiction over inferior courts.

KELYNCE, *Chief Justice*. Before you file the return, let a clause of the statute of 13. Eliz. c. 9. be read; which being done, he said, that by the statute of 23. \* Hen. 8. c. 5. (b) no orders of the commissioners of sewers are binding without the royal assent: now this statute makes them binding without it, and enacts, "that they shall not be reversed but by other commissioners." Yet it never was doubted, but that this Court might question the legality of their orders notwithstanding; and you cannot oust the jurisdiction of this Court without particular words in acts of parliament. There is no jurisdiction that is uncontrollable by this Court. Sir Henry Hungate's Case (c) was a famous case, and we know what was done in it.

\* [ 45 ]

MORETON, *Justice*. Since the making this statute of queen Elizabeth, those cases in Coke's Reports have been adjudged concerning Chester Mills (d). If commissioners exceed their jurisdiction, where are such matters to be reformed but in this court? If any court in England of an inferior jurisdiction exceed their bounds, we can grant a prohibition.

11. Co. 64.  
5. Co. 103.  
Moor, 641.  
Bridg. 63, 64.  
10. Mod. 48.  
54. Co. 137.  
347.  
2. Hawk. P. C.  
9.  
Strange, 302.  
2. Burr. 1042.

TWISDEN, *Justice*. I have known it ruled in 23. Car. 1. that the statute of 13. Eliz. c. 9. where it is said, "there shall be no *superfedeas*, &c." hath no reference to this case but only to the chancery; but this is a *certiorari* whereby the king doth command the cause to be removed, *et voluit* that it be determined here, and no where else.

THE COURT fined them for not obeying two *certiorari*'s, but fining them that brought them five pounds a-piece.

(a) Hetley v. Sir John Boyer, Sir Anthony Mildmay, and Others, Cro. Jac. 336.

(b) See also 3. Jac. 1. c. 14. and 7. Ann. c. 10.

(c) Cro. Eliz. 885.

(d) 10. Co. 138. 4. Inst. 275.

Anonymous

Hilary Term, 21. & 22. Car. 2. In B. R.

Cafe 100.

Anonymous.

Bankrupts.

10. Mod. 20.  
12. Mod. 446.  
11. Mod. 223.  
2. Vern. 293.  
706.  
Abr. Eq. 55.  
2. Peer. Wms. 238. 682.  
2. Peer. Wms. 500.  
3. Peer. Wms. 23. 182. 405. 408.  
Cowp. 449. Dougl. 627.

JONES moved, that one who was partner with his brother, a bankrupt, being arrested, might be ordered to put in bail for the bankrupt as well as for himself.—TWISDEN, *Justice*. If there are two partners and one break, you shall not charge the other with the whole, because it is *ex maleficio*; but if there are two partners and one of them die, the survivor shall be charged for the whole. In this case you have admitted him no partner by swearing him before the commissioners of bankrupts.—So the motion was not granted.

2. Stra. 995. 1157. 2. Ld. Ray. 871. 2. Ch. Caf. 139. And see Cooke's Bankrupt Laws, 2d edit. p. 550 to 557.

\* [ 46 ]

Cafe 101.

\* Rawlins' Cafe.

A judgment, though acknowledged in the name of another, shall not be set aside in a summary way until the offender be convicted.

SCROGGS, *Serjeant*, moved, that *Rawlins* having perfonated one *Spicer* in acknowledging a judgment, that therefore the judgment might be set aside.

TWISDEN, *Chief Justice*. The statute 21. Jac. 1. c. 26. §. 2. that makes it felony, does not provide that the judgment shall be vacated. One *Tymberly* (a) escaped with his life very narrowly, for he had perfonated another in giving bail, but the bail was not filed.

Hawk. 179.  
2. Jones, 64.  
1. Vent. 301.  
3. Cro. 531.  
Cro. Car. 256.  
Cro. Jac. 256.

SCROGGS, *Serjeant*, then moved, that the defendant had paid the fees of the execution, which the plaintiff ought to have done.—So the Court granted an attachment against the bailiff.

1. Hale, 696. Strange, 384.

(a) Adjudged, after argument on a special verdict, that it was not within the statute, because the bail was not filed, but the prisoner was indicted for the *misde-meanor*. 2. Sid. 90. See 1. Hale, 696. Strange, 384. But the statute 21. Jac. 1. c. 26. extending only to proceedings in court, it is by 4. Will. & Mary, c. 4. also made felony to perfonate any other person as bail, before any judge of assize, or other commissioner authorized to take bail in the country. 4. Bl. Com. 121.

Cafe 102.

Taylor against Wells.

Trinity Term, 21. Car. 2. Roll 302.

TROVER for "ten pair of curtains and valons," is bad, for uncertainty, though after verdict.

TROVER AND CONVERSION for *decem parium tegularum et valorum*, ANGLICE, of "ten pair of curtains and valons."

OBJECTION in arrest of judgment, That it is not certain what is meant by "a pair," whether so many *two's* or so many *sets*; and that in *Web v. Washburn* (a) "four pair of hangings" was held not good.

74.  
S. C. 1. Sid. 445. S. C. 2. Keb. 623. 640. S. C. 1. Vent. 71. Post. 289. 1. Keb. 390.  
1. Vent. 106. 114. 3. Keb. 253. 2. Show. 315. 11. Mod. 66. 12. Mod. 3. Ld. Ray. 991.  
2. Stra. 733. 809.

(a) Styles, 352.

TWISDEN,

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TWISDEN, *Justice*. I remember that "a pair of hangings" has been held naught. Trover and conversion "*pro decem ovibus et agnis*," not expressing how many ewes and how many lambs, ruled naught: another action of trover "*de velis*," not saying how many, held to be naught.

TAYLOR  
against  
WALLS.

SAUNDERS urged, on the other side, that "ten pair of curtains and valons" is certain enough; for by "a pair" shall be understood *two*, and so there are twenty in all: if it be objected, that it does not appear how many of each, I answer, the words "ten pair" shall go to both: besides, it is after verdict, and therefore ought to be made good, if by any reasonable construction it may. If it had been *ten sets* or *ten suits*, then without question it had been well enough: now why may not *a pair* be understood of *sets* or *suits*, or so many as will serve for a bed, if it shall not be taken for *a couple*? They quoted some cases in which it had been adjudged, that in trover and conversion for several things, though it did not appear how many of each sort there were, yet it had been held good.

TWISDEN, *Justice*, acknowledged, that there \* had been such resolutions; but said, that he knew not what to think of such cases, considering the uncertainty of the declarations. Now the word "*pair*" in the present case is as uncertain as may be, though a "*pair of gloves*,"—"a pair of cards,"—"a pair of tongs," is certain; for the word applied to some things signifies more, to others less; and what shall it signify here?

\* [ 47 ]

But by THREE JUDGES, viz. KELYNGE, *Chief Justice*, RAINSFORD and MORETON, *Justices*, who severally delivered their opinions against TWISDEN, the plaintiff had judgment.

Foxwift and Others, Executors of Pincent, *against*. Case 103.  
Tremain.

Trinity Term, 21. Car. 2. Roll 1512:

ASSUMPSIT. The plaintiffs being executors, and two of them under the age of seventeen years, they all appeared by *attorney*. The defendant thereupon pleaded *in abatement*, and the plaintiffs demurred.

FIRST, An infant cannot make a warrant of attorney.

SECONDLY, An infant appearing by *attorney* may be amerced *pro falso clamore*: and the reason is, because it does not appear that he is under age; but if he appear by *guardian* or *procchein ami*, he shall not be amerced.

THIRDLY, the infant may be much prejudiced.

For these reasons, and because they said the practice had gone accordingly, judgment was stayed.

625. 633. 691. S. C. 1. Lev. 299. 1. Show. 168. 1. Roll. Abr. 288. 1. Keb. 750. Cro. Eliz. 378. 2. Roll. 207. Cro. Jac. 303. 2. Saund. 213.

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The

If there be several executors they may all sue jointly by *attorney*, though some of them are infants under seventeen years of age. S. C. post. 72. 296. S. C. Raym. 198. S. C. 1. Sid. 449. S. C. 2. Saund. 212. S. C. 1. Vent. 102. S. C. 2. Keb. 537. 1. Lev. 181.

## Hilary Term, 21. & 22. Car. 2. In B. R.

FOXWIST AND  
OTHERS  
against  
TRELMAIN.

(a) 2. Saund.  
212.  
(b) Cited post.  
298.

The cases cited *pro* and *con* were, *Cro. Eliz.* 424. *Cro. Jac.* 441. 1. *Roll* 288. and *Hutton v. Mascall* (a), where a *scire facias* brought by two executors, reciting that there was a third, but within age, it was resolved that all must join; and *Colt v. Sherwood* (b), where it was resolved, that an infant executor cannot defend by attorney.

TWISDEN, *Justice*. Where there are several executors, and one or more under age, and the rest of full age, all must join in an action; and administration *durante minore etate* cannot be granted, if any of them be of full age (c).

(c) See this case moved

again in Mich. Term, 22. Car. 2. and a *respondens ouster* awarded in Trinity Term, 29. Car. 1. post. p. 72. and 296. See also 21. Jac. 1. c. 13. and 4. Ann. c. 16.

### Cafe 104.

### Haspurt against Wills.

A custom that all ships passing by a certain wharf shall pay such a duty is a bad custom; for this being toll thorough cannot be claimed without shewing a consideration.

\* [ 48 ]

S. C. 1. Vent.  
71.  
S. C. 1. Sid.  
454.  
S. C. 2. Keb.  
614. 665.

**E**RROR on a judgment in the common pleas. A special action was brought upon the custom of *wharfage* and *craneage* in the city of *Norwich*: the declaration sets forth, that they have a common wharf, and a crane to it; and then they set forth a custom, that all goods brought down the river, and passing by, shall pay such a duty.

COLEMAN objected, that the custom is not good, for that it is  
\* "toll-thorough;" which is *malum tolnetum*.

TWISDEN, *Justice*. There is a case in *Hob.* 175. of a bad custom of paying the charges of a funeral, though the plaintiff were a stranger, and not buried in the parish. So here, if they had unladed at the key, they should have paid the whole duty; nay, if they had unladed at any other place in the city, there would have been some reason for it; or if the declaration had set forth, that they had cleansed the river. At *Gravesend* they claimed a toll of boats lying in the river of *Thames*; and it was adjudged in Parliament to be *malum tolnetum*.

The judgment was reversed.

*Cro. Eliz.* 711. Post. 104. 232. *Jones*, 162. *Moore*, 575. 2. *Mod.* 143. 4. *Mod.* 320. 2. *Roll. Abr.* 522. 1. *Sid.* 284. 2. *Sid.* 178. 6. *Mod.* 123. 1. *Lev.* 14. 1. *Lev.* 400. Post. 231, 232. 3. *Lev.* 425. 400. 2. *Roll. Abr.* 522. 1. *Roll. Abr.* 547. *Will.* 63. 296. *Str.* 1224. 3. *Burr.* 1402. 2. *Will.* 298. *Dougl.* 119. 201. 218. 616. See the case of *Coke v. Smith*, *Cowper*, 47. and *Ld. Pelham v. Pickersgil*, 1. *Term Rep.* 660.

### Cafe 105.

### Heskett against Lee.

*Easter Term, 22. Car. 2. Roll* 408.

A common recovery suffered by an infant under a *PRIVY*

**A** WRIT OF ERROR was brought to reverse a judgment given in a common recovery in the county palatine of Lancaster.

It is not erroneous, although on the record the guardian be admitted "*ad sequendum*," and his appearance entered in *propria persona sua*; for the guardian does follow the suit of the infant in his own person.—S. C. 2. Saund. 94. S. C. 1. Sid. 446. S. C. 2. Keb. 627. S. C. 1. Vent. 73. S. C. 2. Danv. 772. Post. 246. 252. 1. *Sid.* 321. 118. 252. 446. *Cro. Eliz.* 323. 1. *Lev.* 242. 163. *Godb.* 161. *Cro. Jac.* 641. *Cro. Car.* 307. 1. *Roll. Abr.* 731. *Hob.* 196. 1. *Jones*, 318. *Stiles*, 246. *Fitzg.* 114. 12. *Mod.* 1. *Gillb. Eq. Rep.* 16. 8. *Mod.* 25. 9. *Mod.* 103. 153.

WESTON.

## Hilary Term, 21. & 22. Car. 2. In B. R.

WESTON. The tenant in the common recovery is *an infant*, and appears by his *guardian*. But there is a fault in the admittance; for he ought to have been admitted as defendant in this form: "SCILICET, *A. B. admittitur per C. D. guardianum suum ad comparandum et defendendum*;" whereas he is admitted in the record "*ad sequendum*."—THE SECOND ERROR is in the appearance; which is entered in this manner: SCILICET, *qui admissus est ad sequendum, &c.*" (following the error of the admittance) "*ut guardianus ipsius THOMÆ in propria personā suā venit et defendit, &c.*" so that he is admitted "*ad sequendum*," which is the act of the plaintiff; and as guardian he defends, which is the act of the defendant: and further, it is said, that the guardian appears *in propria personā*, which cannot be. Now I conceive that the assignment of the guardian, and the appearance of the guardian, is triable by the record: and if the infant should bring an action against his guardian, he must declare that he was admitted to appear and defend his right. Now, Whether will this admittance *ad sequendum* warrant such a declaration? I conceive it will not, and that therefore the recovery is erroneous.

HESKETT  
against  
LEE.

WINNINGTON. I am for them that claim under the recovery. And I conceive this whole record is not only good in substance, but according to the form used in all common recoveries. If an infant tenant appear *by guardian*, either as defendant or vouchee, he shall be bound, as well as one of full age. \* And if the guardian *faint-pleads* or *mispleads*, the infant hath an action against him: 9. *Edw. 4. pl. 34, 35. Dyer 104. b.* In our case there is a common recovery, wherein the tenant is *an infant*, who ought to appear by his guardian: Whether the admittance of him here by his guardian, be well entered or no, is the question? The word "*sequi*" signifies only to *follow* the cause; and the defendant doth prosecute and act: a *venire*, by proviso, may be taken out at the defendant's suit: 35. *Hen. 8. pl. 7.* So in a replevin the defendant is the prosecutor; and the tenant doth sue in common recovery, and is the only person that doth prosecute an act; so that I think the word is proper. It is true, one book is cited, where "*prosequendum*" is void in an ejectment: *Cro. Jac. 640, 641. Sympson's Case*; but that judgment is upon the point of *prochein amy*. There is a precedent for me in 6. *Car. 1.* which I believe was the precedent of this case. And *Sir Francis Englefield's Case*, where the infant came in as vouchee, is the same with ours. As for the second error assigned, *viz.* that the guardian is said to come *in propria personā*; in the *Earl of Newport's Case*, and in *Englefield's Case*, "*propria personā*" is in the same manner as here. Now the law doth not regard so much the manner of the admittance, as that a good guardian be admitted.

• [ 49 ]  
Ld Ray. 113.  
232. 600.  
1. Vern. 461.  
1. Eq. Abr.  
233.  
1. Stra. 445.  
2. Stra. 1026.  
1. Peer. Wms.  
536.  
1. Peer. Wms.  
117. 244. 298.  
387. 519. 549.  
(643.)  
3. Peer. Wms.  
206. 235.  
Cruiseon Retov.  
148.  
2. Bac. Abr.  
533.  
3. Bac. Abr.  
150.  
Sheph. Touch.  
491. 50.  
Cowp. 349.

TWISDEN, *Justice*. This is a recovery suffered upon a privy-seal from the king (a<sup>1</sup>), and upon a marriage settlement upon good

(a) See Hob. 156.

## Hilary Term, 21. & 22. Car. 2. In B. R.

HESKETT  
against  
LEE.

consideration; and therefore ought to be favoured. The word "*sequatur*" is as proper for the defendant as for the plaintiff. And for the second, the words "*propria personâ*" are well enough, being applied to the guardian, who does in proper person appear for the infant. For an infant to suffer a common recovery, if it were *res integra*, it would hardly be admitted. But if an infant will reverse a common recovery, he ought to do it whilst he is under age, as it was adjudged here about two years ago, according to my LORD COKE's opinion.

An infant cannot reverse a recovery after his full age. Co. Lit. 380. b. Cro. Car. 307. Recov. 148.

WESTON. If you stand upon that, Whether an infant, having suffered a common recovery, may reverse it after he is of full age? I desire to be heard to it.—*Cur. advisare vult (a)*.

1. Sid. 321. 1. Lev. 142. Pigot, 64. 166. Hob. 196. W. Jones, 318. Salk. 567. Ld. Ray. 113. 2. Bac. Abr. 504. 3. Bac. Abr. 136. Cruise on

(a) The Court affirmed the recovery. S. C. 1. Vent. 74. S. C. 2. Saund. 94. S. C. 1. Sid. 446.

\* [ 50 ]

Case 106.

\* Tildell against Walter.

Wood is small tithes, and by custom may be payable to the parson instead of the vicar.

S. C. 2. Keb.

628. S. C. 1. Sid. 447. S. C. 1. Vent. 75. S. P. 1. Vent. 61. S. P. Hutton, 77, 78. Poole 216. 2. Peer. Wms. 522.

A VICAR libelled in the spiritual court for tithe of wood. BARRELL prayed a prohibition, suggesting, that time out of mind they paid no *small tithe* to the vicar; but that small tithes, by the custom of the parish, were paid to the parson.—TWISDEN, *Justice*. If the endowment of the vicarage be lost, small tithes must be paid according to prescription.

See 2. Edw. 6. c. 13.

Case 107.

Jordan against Fawcett.

Indebted against an executor A plea of judgment recovered, and no assets *ultra*, without alleging in what court, and the time when, is bad on general demurrer.

S. C. 1. Sid. 449.

S. C. 1. Vent. 76. S. C. 2. Keb. 632.

ERROR of a judgment in the common pleas. An action of debt was brought in the common pleas against an executor, who pleaded several judgments; but for the last judgment that he pleads, he doth not express *where* it was entered, nor *when* obtained; to which plea the plaintiff demurred and had judgment.—COLEMAN held it well enough upon a general demurrer.—TWISDEN, *Justice*. It is not good, for by this plea the plaintiff is tied up to plead nothing but "*nul tiel record*." He might, if the judgment had been pleaded as it ought to have been, have pleaded perhaps "*obtent. per fraudem*."—The judgment was accordingly affirmed.

Barnaby

UPON an issue out of chancery the jury find a special verdict, *viz.* That one *Gilbert Thirle* was seised of the lands in question for three lives, and demised the same to *Nicholas Love* the father, for a term of years, if the *cestui que vies*, or any of them, should so long live: that he being so possessed made his will, and devised them in this manner; *viz.* to his wife for her life; and after her decease to *Nicholas* his son for his life; and if *Nicholas* his son should die without issue of his body begotten, then he deviseth them to *Barnaby* the plaintiff. Then they find, that the wife was executrix, and that she did agree to this devise.

If a term be devised to A. for life, with remainder to B. for life, and if B. die without issue of his body begotten, then to C. the limitation over to C. is too remote to take effect.

And, Whether this be a good limitation to *Barnaby* or not? is the question.

S. C. 1. Eq. Ab. 191.

JONES. I conceive it is a good limitation to \* *Barnaby*. I shall enquire FIRST, Whether a termor having devised to one for life, and after his death to another for life, may go any further? and SECONDLY, admitting that he may go further, Whether the limitation in our case, which is to begin after the death of the second, without issue of his body, be good or no?

\* [ 51 ]  
S. C. 1. Lev. 290.  
S. C. 2. Keb. 637.  
S. C. 1. Vent. 79.

For THE FIRST POINT he said, the reason given in *Plowden* (a) and in *Coke* (b) why an executory devise of a term is good in law, is, Because the law takes it as devised to the last man first, and then afterwards to the first man, without which transposition it is not good; for if it should be a devise to the first man first, there would be nothing left for the last but a possibility, which is not grantable over (c). Now then, if a man may devise a term after the death of another, then he may devise it after the death of two others. It is true, this cannot be in grants, for they are founded upon contracts, and there must be a certainty in them, according to the rector of *Chedington's Case* (d). Now, if a devise may be good after the death of one or two, it is all one if it be limited after the death of five or six. Now that a contingency may be devised upon a contingency, I take it that the authorities are clear: in the case of *Cotton v. Herle* (e) it was so resolved by three Justices; and also in the case of *Restorick v. Chappel* (f). As for the case of *Child v. Bayly* (g) I conceive it is not against our case, for

S. C. 1. Sid. 450.  
S. C. 2. Chan. Rep. 14.  
Post. 114.  
1. Roll. Abr. 610. pl. 7.  
Palm. 50.  
Pollex. 29.  
10. Co. 87.  
1. Sid. 37.  
1. Lev. 25. 290.  
3. Lev. 22.  
10. Mod. 402.  
419. 501.  
12. Mod. 44.  
52. 278. 283.  
592.  
9. Mod. 28. 93.  
101. 124.  
Fitzg. 314. 321.  
1. Vern. 234.

304. 462. 2. Vern. 23. 38. 86. 151. 195. 362. 600. 758. 766. Prec. in Ch. 323. 421. Abr. Eq. 191. Ca. Tem. Talb. 21. 1. Peer. Wms. 1. 98. 432. 534. 2. Peer. Wms. 608. 618. 625. 686. 3. Peer. Wms. 29. 113. 300. Sec. 2. Danv. 523. pl. 6. 1. Lev. 25. 290. 1. Sid. 37. 3. Lev. 22. 23.

(a) Plowd. Comm. 519.

(b) 8. Co. 94.

(c) But see 2. Burr. 1131. 1. Bl. Rep. 251. 3. Peer. Wms. 132. 1. Stra. 132. 1. Vezey, 412.; and Jones v. Roe, 1. H. Bl. Rep. C. B. 30. that a possibility coupled with an interest is devisable. S. C. confirmed in B. R. on a writ of error, 3. Term Rep. 88.

(d) 1. Co. 156. See also Lord Stafford's Case, 8. Co. 73.

(e) 1. Roll. 612.

(f) Hilary Term, 9. Jac. 1. 2. Bullf. 28. Godolph. 149.

(g) Cro. Jac. 459. 1. Roll. Abr. 613. 1. Eq. Caf. Ab. 192. 2. Roll. Rep. 129. Palm. 48. 333.

Hilary Term, 21. & 22. Car. 2. In B. R.

LOVE  
against  
WYNDHAM.

they held the devise to be void, not because it was a contingency upon a contingency, but in respect of the remoteness of the possibility, and because the term was wholly devised to a man and his assigns; so that by the express authority of the two first cases, and by the implication of this case, I do think that a devise to a man after such a manner is good, provided that it do not introduce a *perpetuity*: so that where there is not the inconvenience of a perpetuity, though there are many contingencies, they are no impediment to the devise. Therefore where a devise is upon a contingency that may happen upon the expiration of one or more men's lives, and where it is upon a contingency that may endure for ever, there is a great difference. The reason of the rector of *Chedington's Case* was because of the uncertainty, for in case of a grant of a term there is a great uncertainty; but ours is in case of a devise, which is not taken in the law by way of remainder (a); so that I conceive a contingency may be limited \* upon a contingency, provided that it be not remote.

\* [ 52 ]

THE SECOND POINT is, Whether this devise, thus limited, be a good devise? Now I conceive the limitation is as good as if it had been to his wife for her life, and after her death to *Nicholas* for life, and after his death to *Barnaby*. I agree, that if these words "if *Nicholas* die without heirs of his body" shall not be applied to the time of his death, it will be a void devise; but the meaning is, that if at the time of his death he shall have no issue, then, &c. Now that they must have such construction I prove from the words of the will. The limitation of the remainder must be taken so as to quadrate with the particular estate; as if there be a conveyance to one for life, and if he die without issue to another; this is a good remainder upon condition, and the remainder shall rest upon the determination of the particular estate, if the tenant for life have no issue when he dieth: but if a man convey to one, and the heirs of his body, and if he die without issue, to another, there it must be understood of a failure of issue at any time, because the precedent limitation goes further than his life. But admitting there were no precedent words to guide the intention, and that common parlance were against me, yet if there be but a possibility of a good construction, it shall be so construed; and they may very well be understood of his dying without issue of his body at the time of his death. In the case of *Goodyer v. Clerk* in this court (b) I confess it was adjudged, that it would be understood of a failure of issue at any time; but in our case, if you shall not understand it of a failure of issue at the time of his death, it cannot have any construction at all to take effect. I think there are no express authorities against me; those that may seem to be so I will put, and endeavour to give an answer to them. As for the case of *Child v. Bayly*, reports differ upon the reason of that judgment;

(a) 12. Aff. pl. 5.

(b) Trinity Term, 12. Car. 1. Roll 1048. 1. Lev. 35.

Hilary Term, 21. & 22. Car. 2. In B. R.

for CROKE says (a), it was held to be a void devise, because it was taken if he die without issue at any time during the term: but SERJEANT ROLLE (b) goes upon another reason; for he says, it is void because given absolutely to the son and his assigns before. In the case of *Leventhorp v. Ashby* (c), the remainder \*there is said to be void, because when he had devised the term to A. and the heirs males of his body, it shall go to the executors of A. and the remainder there was to begin upon his dying without issue at any time. The case of *Saunders v. Cornish* (d) will not come to ours; for there were many limitations for life successively to persons not in being, &c. In the case cited in the First Report (e), of an estate for life limited to one, and to every heir successively an estate for life, the limitation was naught, because it would make a perpetual freehold; and nobody would know where the absolute estate should vest.—So he prayed judgment for the plaintiff.

LOVE  
against  
WYNDHAM.

• [ 53 ]

COLEMAN for the defendant. I conceive this to be a void limitation. MR. JONES would make this a middle case. I shall discharge him of the first point, though he has taken pains to argue it: and I shall rest upon this, that the limitation of a term after the death of a man without issue of his body, is void. The case is put as a middle case to these two, viz. If a man possessed of a lease for years, devise it to J. S. for life; the remainder to J. N. for life, the remainder to J. G. for life; these remainders are good. But if he devise to J. S. and the heirs of his body, the remainder over, this remainder he admits to be void, because it depends upon so remote a possibility as may never happen. Now I conceive it is the same thing to limit it to one for life, and if he die without issue, then to another for life, as to limit it to one and the heirs of his body, with a remainder over. He would tie it up from the ordinary and legal construction, viz. to issue at the time of his death. If it be to be understood of dying without issue at any time, then *Child v. Bayly* (f), and *Cornish's Case* (g) are full authorities in the point. There a lessee for years deviseth to one for life, and after to Williams, and his assigns, and if he die without issue then living, the remainder to J. G.; this they say is good in case of a fee-simple, but they will not allow it in case of a term for years. Now MR. JONES would by construction bring the words "then living" into our case. The legal construction of the words "dying without issue" is, if there be a failure of issue at any time \*to come. In the case of *Pell v. Brown* (h), if the words "then living" had not been in the will, the case had not been so adjudged.

• [ 54 ]

KELYNGE, Chief Justice. You go up hill a little. Can Barnaby take so long as there is any issue in being of Nicholas?

(a) Cro. Jac. 462.

(b) 1. Roll. Abr. 613.

(c) 1. Roll. Abr. 611.

(d) 1. Roll. Abr. 612. 614.

(e) 1. Co. 135.

(f) Cro. Jac. 459.

(g) 1. Roll. Abr. 612. 614.

(h) 3. Lev. 22. 432.

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Love  
against  
WINDHAM.

JONES. He cannot.

KELYNGE, *Chief Justice*. Then *Barnaby's* interest depends upon a contingency that may never happen.

JONES. I grant, if *Nicholas* hath issue at the time of his death, that *Barnaby* shall never take, but if he hath none he shall.

KELYNGE, *Chief Justice*. If I devise lands to *A.* for life, and if he die without issue of his body, to *B.* *A.* shall have an estate-tail. So in this case the words and limitation are the same, though, the devisor having but a lease for years, there cannot be an estate-tail of it (*a*): yet he intended not that *Barnaby* should have an estate as long as there were any issue in being of *Nicholas's* body.

TWISDEN, *Justice*. It appears to me, upon the reason of the cases that have been cited, that the remainder to *Barnaby* must be void, because of the remote possibility.

If a tenant of a term devise it to *B.* for life, the remainder to *C.* for life, the remainder to *D.* for life; I have heard it questioned, Whether these remainders are good or not? But it hath been held, that if all the remainder-men are living at the time of the devise, it is good: if all the candles be light at once it is good. But if you limit a remainder to a person not in being, as to the first-begotten son, &c. and the like, there would be no end if such limitations were admitted, and therefore they are void: and some Judges are of the same opinion to this hour.

If a term be devised to *A.* for life, with a void remainder over, and *A.* die before the term expires; *Quære*, If it shall go to the personal representative of the devisor or devisee?

\* [ 55 ]

Post. 115.  
1. Sid. 451.  
2. Roll. Abr. 612.  
7. Co. 23.  
1. Sid. 37.

BUT then there will be a question, To whom the remainder of the term will go, if *Nicholas* die without issue? Whether to the executors of *Nicholas*, or to the executors of *Dr. Love*?

If I devise a term to *A.* for life; after the death of *A.* his executors shall not have it, but it shall go to the executors of the devisor: but if it be devised to *A.* generally, without saying "for life," it shall go to his executors after his death. But a devise for life vests in him only during his life, and you may make a limitation over.—KELYNGE, *Chief Justice*. I take it, that *A.* carries the whole term, when devised to him for life; because an estate for life is larger than the longest term.—TWISDEN, *Justice*. \* As a term for years doth admit of *remainders*, so it doth of *reversions*, if you will have it so; and when he deviseth to *A.* during his life, *A.* shall have it for his life; but the reversion shall be to the devisor's executors. But if he devise it to *A.* for life, and if he die without issue of his body, the remainder to *B.* what shall become of the reversion then?—KELYNGE, *Chief Justice*. You start a new point.

(\*) See Mr. Hargrave's edition of Co. Lit. 20. a. note (5).

## Hilary Term, 21. & 22. Car. 2. In B. R.

THE COURT. You shall have our judgments this Term (a).

Love  
against  
WYNDHAM.

(a) The whole Court were unanimously of opinion, that the remainder to *Barnaby* was void. S. C. 1. Lev. 290. for that as he could not take until the death of *Nicholas* without issue, it was the same in effect as if it had been to *Nicholas* and the heirs of his body, with remainder to *Barnaby*; which devise would have been clearly bad, because after a term is devised to one, and the heirs of his body, no other limitation, nor any appointment of it by way of executory devise, can be made; for the law will not presume any term to have continuance so long as issue of the body may continue; and therefore a limitation in this respect, after an indefinite failure of issue, depends upon too remote a possibility. S. C. 1. Sid. 451. And it was certified accordingly to the court of chancery, that *Barnaby* the plaintiff had

no title. S. C. 2. Keb. 639.—But see the Cases, *Nichols v. Hooper*, 1. Peer. Wms. 198.; *Target v. Grant*, 1. Peer. Wms. 432.; *Pinbury v. Elkin*, 1. Peer. Wms. 565.; *Forth v. Chapman*, 1. Peer. Wms. 666.; *Pleydel v. Pleydel*, 1. Peer. Wms. 748.; *Maddox v. Stains*, 2. Peer. Wms. 421.; *Atkinson v. Hutchinson*, 3. Peer. Wms. 259.; *Sabberton v. Sabberton*, *Forrest Rep.* 55. 245.; *Beauclerk v. Dormer*, 2. Atk. 313.; *Saltem v. Saltem*, 2. Atk. 376.; *Stafford v. Buckley*, 2. Vezey, 181.; *Keiley v. Fowler*, 6. Brown's Parl. Cases, 309.; *Bigg v. Bensley*, 1. Brown's Chan. Cases, 188.; *Sheffield v. Every*, 3. Peer. Wms. 306.; *Lyde v. Lyde*, 1. Term Rep. 593.; *Peake v. Pegdon*, 2. Term Rep. 720.; *Porter v. Bradley*, 3. Term Rep. 143.

Knowles against Richardson.

Case 109.

ERROR of a judgment in the common pleas in an action upon the case for obstructing a prospect.

An action will not lie for building a wall, by means of which a prospect is destroyed. S. C. 2. Keb. 611. 642.

SYMPSON. The stopping of a prospect is no nuisance, and consequently no action on the case will lie for it: *Aldred's Case*, 9. Co. 58. is express, That for obstructing a prospect, being matter of delight only, and not of necessity, an action will not lie.

1. Vent. 237. 239. Ray. 87. 6. Mod. 116. 314.

TWISDEN, Justice. Why may not I build up a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light.—The judgment was reversed.

1. Lev. 239. 248. 9. Co. 58. Hob. 131. Hutt. 136. Poph. 170. 2. Salk. 459. Com. 58. 11. Mod. 79. 8. 12. Mod. 215. 510. 519. 635. 648. 1. Ld. Ray. 737.

Anonymous.

Case 110.

TWISDEN, Justice. A man may be indicted for perjury in a COURT BARON.

Perjury, 2. Ro. Abr. 257. 3. Peer. Wms. 196. 311.

12. Mod. 511. 1. Hawk. P. C. 319. 2. Stra. 1088. 1. Ld. Ray. 451.

Anonymous.

Case 111.

JONES moved to have a trial at bar for lands in Northumberland of fifty pounds per annum.—KELYNCE, Chief Justice. It is a great way off, and never any jury came from thence in your time.—TWISDEN, Justice. But I have been of counsel in causes wherein

Trial at bar of lands in Northumberland. 2. Burr. 834. 1. Ter. Rep. 363.

## Hilary Term, 21. & 22. Car. 2. In B. R.

**ANONYMOUS.** wherein trials have been granted *at bar* for lands there. We have lost *Cornwall*; no juries from thence come to the bar, and we shall lose *Northumberland* too.—The other side to shew cause.

\* [ 56 ]

Case 112.

\* Anonymous.

Attachment lies for arresting on Sunday. **K**ELYNGE, *Chief Justice*, upon a motion of Mr. HOLT, said, I have known many *attachments* for arresting a man upon a Sunday; but still the affidavit contained, "that he might have been taken on another day."—TWISDEN, *Justice*. So for arresting a man as he was going to church to disgrace him.

Hedl. 19.  
1. Salk. 87.  
6. Mod. 96.  
11. Mod. 4. 111. 346. 8. Mod. 80. Cowp. 136. 1. Term Rep. 266.

<p>By 29. Car. 2: c. 7. f. 6. it is provided, "that no person upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree (except in the cases of treason, felony, or breach of the peace), but that the service of every such writ, process, warrant, order, judgment, or</p>	<p>"decree, shall be void to all intents and purposes whatsoever; and the person so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without writ, process, warrant, order, judgment, or decree, at all."</p>
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### Memorandum.

Promotion of Littleton. **I**N this Term TIMOTHY LITTLETON, *Serjeant at Law*, was made one of the Barons of the Exchequer.

Raym. 185.

### Memorandum.

Promotions of Finch and Turner. **I**N Easter Term 22. Car. 2. died SIR JOEYFFRY PALMER, BART. *Attorney General*.—SIR HENEAGE FINCH, *Solicitor General*, succeeded to his place; and SIR EDWARD TURNER was made *Solicitor General*.

TRINITY

# TRINITY TERM,

The Twenty-Second of Charles the Second,

IN

The King's Bench.

Friday, 3 June, 1670.

*Sir John Kelynge, Knt. Chief Justice,*

*Sir Thomas Twifden, Knt.*

*Sir William Moreton, Knt.*

*Sir Richard Rainsford, Knt.*

} *Justices.*

*Sir Heneage Finch, Knt. Attorney General.*

*Sir Edward Turner, Knt. Solicitor General.*

\* [ 57 ]

Parker *against* Welby, late Sheriff of Lincoln.

Case 1.

*Trinity Term, 21. Car. 2. Roll 1505.*

**A**CTION UPON THE CASE against a sheriff for making a *false return*. The plaintiff sets forth, that one *Wright* was indebted to him in sixty pounds, and did promise to pay him, and that thereupon a writ was sued out against him directed to the defendant, being sheriff of *Lincolnshire*, who took him into his custody, and after suffered him to go at large whither he would, and at the day of return he returned that he had his body ready.

An action on the case will not lie against a sheriff for returning *capi corpus et paratum habes* when he had let the party to bail; and he may *demur*, or he may plead the

JONES. They have demurred to the declaration; which I conceive to be a good declaration. For take the case, that there went a *latitat* to the sheriff, and the sheriff took the person upon it, and let him go at large, nobody will deny but that an *action of* evidence on the general issue.—S. C. ante, 33. S. C. 2. Keb. 591. 616. 630. 657. 670. S. C. 2. Saund. 155. S. C. 1. Sid. 439. S. C. 1. Vent. 85. Post. 227. 239. 244. Cro. Eliz. 460. Moor, 428. 1. Sid. 22. 1. Lev. 214. 2. Lev. 28. 144. Comyns, 132. 12. Mod. 311. 4<sup>th</sup> 5. 494. 516. 527. 557. 579. 1. Ld. Ray. 399. 1. Stra. 423.

*escape*

Trinity Term, 22. Car. 2. In B. R.

PARKER  
against  
WELBY.

*escape* will lie against him; and when he makes such a *false return* as here, viz. "that he has the body ready," why will not an action lie for a false return? This is no new case, but hath been adjudged in the cases of *Langton v. Gardiner*, *Moor* 428. and in *Barton v. Aldeworth*, *Cro. Eliz.* 624. It is at the plaintiff's election to follow the sheriff with *amercements*, or to bring his action for the *false return*. And when this action has been brought formerly, they were forced to plead the statute of the 23. *Hen.* 6. c. 10. none ever demurred generally.

• [ 58 ]

4. Co. 120. b.  
1. Sid. 24.  
Fost. 205.

TWISDEN, *Justice*. I remember a case of *Franklyn v. Andrews*, where an action upon the case was brought against a sheriff for such a false return: he pleaded the statute of 23. *Hen.* 6. c. 10. and they held in that case, that the sheriff could not return any thing else but *cepi corpus*; and old HODSON, that fate here, remembered the case of *Langton v. Gardiner*, reported in *Cro. Eliz.* 460. and said, THE COURT did amerce the sheriff for a bad return; but the judgment was given in that case for the plaintiff, because there was a traverse *aliter vel alio modo*, which could not be, unless a false return had been confessed; and THE COURT ordered judgment to be entered for \*the plaintiff for that cause. In the case of *Franklyn v. Andrews* the Court held, That upon issue "not guilty," the statute might be given in evidence: but upon a demurrer you ought to plead the statute; and the general demurrer cannot be helped in this case, unless you will say that it is a general law. *Whelpdale's Case* (a) is, that the statute must be pleaded, because it is a particular law: but it concerns extortion in all sheriffs; and the statute of 13. *Eliz.* c. 20. that concerns all parsons touching non-residency, is held to be a general law; and it is not to be stirred now: but if the point were to be adjudged again, perhaps we might be of another opinion.

KELYNGE, *Chief Justice*. They have relied here upon the false return, and the general demurrer I take to be well enough.

MORETON and RAINSFORD, *Justices*, accorded; wherefore judgment was given against the plaintiff (b).

(a) 2. Roll. Abr. 709. 5. Co. c. 9.; but in the case of *Samuel v. Evans*, Trinity Term 28. Geo. 3. 119.

(b) In the reports of this case in *Sauvaders*, *Keble*, *Siderfin*, and *Ventris*, it is said, that judgment was given for the plaintiff, because the defendant had not pleaded the statute 23. *Hen.* 6. it was at length determined, that this statute is a public act, and therefore THE COURT will take notice of it, though it is not pleaded. 2. Term Rep. 569.

Trinity Term, 32. Car. 2. In B. R.

Lake against King.

Case 2.

Michaelmas Term, 20. Car. 2. Roll. 111.

**T**HE plaintiff brought an action upon the case for publishing a libel in which he was defamed, &c. The publication was in delivering several printed papers, wherein the plaintiff was slandered, to several Members of a Committee of the House of Commons.

If a petition to parliament be referred to a committee, an action will not lie for printing and distributing a number of copies for the use of the members, altho' the matter be false and scandalous.

**JONES.** It is true, if a man make a complaint in a legal way, no action lieth against him for taking that course, if it be in a competent court: but that which we say is not lawful in this case, is his causing the matter to be printed and published. Agreeable to this case are the common cases of letters: If a man will write a scandalous letter and deliver it to the party himself, this is no slander (a); but if he acquaint a third person with it, an action will lie. So here, since he will publish this matter by printing it, or if he had but written it, it might have been actionable; for the Members ought not to be prepossessed (b).

S. C. Hardres, 470. S. C. 1. Sid. 414. S. C. 1. Lev. 240.

S. C. 1. Saund. 131. S. C. 2. Keb. 361. 462. 496. 659. 664. 801. 832. S. C. 2. Vent. 28. S. C. 1. Danv. 196. Godb. 405. Yelv. 152. 4. Co. 14. Hob. 252. 180. Fitzg. 47. 57. 65. 122. 253. 11. Mod. 99. 12. Mod. 218. 1. Ld. Ray. 417. 486.

(a) Sed vide 12. Co. 35. Hob. 62. S. C. 1. Saund. 26. S. C. 2. Keb. 215. Poph. 139. Salk. 418. 832. Sed vide S. C. 1. Sid. 415.

(b) This Case having depended twelve Terms, judgment was given, on a demurrer to the plea in bar (by HALE, Chief Justice, TWISDEN and RAINSFORD, Justices) for the defendant, on this point, viz. that it was the order and course of proceedings in parliament to print, and deliver copies, &c. of petitions after they are referred to committees. 1. Lev. 240. 1. and between the same parties an action was maintained, and damages recovered, for publishing a libellous answer to this petition before it had been presented to the committee. Hard. 470. 2. Keb. 832. Vide Rex v. Salisbury, 1. Ld. Ray. 341. and 1. Hawk. P. C. c. 73. s. 8. 12. 15. 1. Term Rep. 110.

\* [ 59 ]

\* King against Standish.

Case 3.

**A**N ACTION UPON THE STATUTE OF PRÆMUNIRE for impeaching in the chancery a judgment given in the king's bench. The defendant demurred.

A defendant against whom a judgment has been obtained in the king's bench cannot be sued upon the statute of præmunire for bringing an English bill in the court of chancery to be relieved against such judgment, although he obtain a decree against the

**BIGLAND, for the defendant.** The question is, Whether the court of chancery be meant within the statute of 27. Edw. 3. c. 3. This question has been controverted formerly, but has not been stirred within these forty years last past: it concerns the chancery as it is a court of equity. Now the statute cannot be applied to the chancery as such, for it was not a court of equity at that time; and if so, then must the statute be applied to other courts where the *gravamen* then was. Mr. Lambard in his "Jurisdiction of Courts," says of this court, that "the king did at first determine causes in equity in person, and about the twentieth year of Edward the Third, the king, going beyond sea, de-

plaintiff to enter satisfaction on the record, and to pay him his costs.—S. C. 1. Sid. 463. S. C. 1. Lev. 241. S. C. 2. Keb. 402. 661. 787. Post. 94. Hard. 120. Raym. 227. 2. Keb. 221. 354. Cary, 4. 106. 2. Ld. Ray. 1561. 1. Hawk. P. C. c. 19. s. 17.

"gated

Trinity Term, 22. Car. 2. In B. R.

KING  
against  
STANDISH.

[ 60 ]

"gated this power to the chancellor;" and then he says, "several statutes were made to enlarge the jurisdiction of this court, as 17. Rich. 2. c. 6. &c." But the chancellor took not upon him *ex officio* to determine matters in equity till *Edward the Fourth's* time; for till then it was done by the king in person; or he delegated whom he pleased; so that the *gravamen* of that statute could not be in the chancery. SECONDLY, It is not possible that the king can be disinherited in his own courts; and therefore the statute must be understood of courts that stand in opposition to the king's courts, and only foreign courts: but this court is held by the king's seal, and the judgments in it are according to the king's conscience. THIRDLY, It is said in the statute, "That the offenders shall have a day given them to appear before the king and his council, or in his chancery, &c.;" and it is strange that the chancery should give the remedy, if that were one of the courts wherein the offence were incurred. My FOURTH REASON is from the penalty: the penalty is very rare and great; for they must be put out of the king's protection, their lands forfeited, and their bodies imprisoned at the king's pleasure. The penalty is fitted well for those that draw the king's subjects out of the king's jurisdiction; but so great a penalty to be inflicted for suing in the king's courts is not so reasonable. If a man sue in the ecclesiastical court for a matter temporal, \* shall he incur a *præmunire*? An action upon the case may lie when a man is mistaken in the court in which he ought to sue; but to make it a *præmunire* seems not so reasonable: the usurpations of the bishop of Rome were the cause of the making of this statute, and all other statutes of *præmunire*; 28. Edw. 3. c. 1. 16. Hen. 6. c. 5. the complaint was all along of the bishop of Rome's usurpations, but not a word of the chancery. Sir John Davies in his Case of *Præmunire* tells us, that all the statutes were made upon this occasion. Of all the attainders of *præmunire*, there never was one for suing in the chancery: the great objection is from these words in the statute, "or which do sue in any other court." Now, say they, this last disjunctive must be applied to this court, and not to the court or courts mentioned before; but I answer, there were other ecclesiastical courts within this realm besides that that was a standing court, and had a constant dependance upon the pope here, and they were aimed at by this disjunctive: those courts derived their jurisdiction from the court of Rome and not from the king. There is an authority in the point in 5. Edw. 4. pl. 6. Now for authorities, I confess there are great ones against me; as in the cases of *Heath v. Ridley*, Cro. Jac. 335. and *Courtney v. Glanvil*, Moor 838. my LORD COKE in his chapter of *Præmunire*, and the Year Book 22. Edw. 4. fol. 37. But the greatest authority against me is the case of *Throgmorton v. Finch*, reported by my LORD COKE in his Treatise of Pleas of the Crown, chapter *Præmunire* (a); but the practice has been con-

2. Cro. 343.  
3. Inst. 124.  
1. Roll. Abr.  
381. pl. 2.

(a) 3. Inst. 124.

Trinity Term, 22. Car. 2. In B. R.

rary, not one person attainted of a *præmunire* for that cause. In King James's time the matter was referred to the counsel, who all agreed, that the chancery was not meant within the statute (a); which opinions are enrolled in chancery; and the king, upon the report of their reasons, ordered the chancellor to proceed as he had done (b); and from that time to this I do not find that his point ever came in question: and so he prayed judgment for the defendant.

KING  
against  
STANDISH.

SAUNDERS. As to that objection, that at the time when this statute was made there were no proceedings in equity, I answer, that granting it to be true, yet there is the same mischief; the proceedings in one part of the chancery are *coram dom. rege in cancellariâ*; but an ENGLISH BILL is directed "to the Lord Keeper," and decreed: so that there is a difference in the proceedings of the same court. But admit that courts of equity \* are the king's courts, yet they are *aliæ curiæ*, if they hold pleas of matters out of their jurisdiction, 16. Rich. 2. c. 5. 1. Roll. Abr. 381. There is a common objection, that if there were no relief in chancery a man might be ruined; for the common law is rigorous, and adheres strictly to its rules. I cannot answer his objection better than it is answered to my hand in *Doctor and Student*, lib. 1. cap. 18. He cited 13. Rich. 2. num. 30. *Sir Robert Cotton's Records*. It is to be considered, What is understood by being impeached? Now the words of another act will explain that, viz. the 4. Hen. 4. c. 23. By that act it appears, "that it is to draw a judgment in question any other way than by writ of error or attainr." One would think this statute so fully penned that there were no room for an evasion. There was a temporary statute, which is at large in *Rastall*, 31. Hen. 6. c. 2. in which there is this clause, viz. "that no matter determinable at common law shall be heard elsewhere;" à fortiori, no matter determined at common law shall be drawn in question elsewhere. He cited 22. Edw. 4. pl. 36. *Sir Moyle Finch v. Throgmorton*, 2. Inst. 335. and *Glanvill v. Courtney*: he put them also in mind of the article against CARDINAL WOLSEY, in *Coke's Jurisdiction of Courts*. Tit. "Chancery." So he prayed judgment for the plaintiff.

\* [ 61 ]

Post. 94.

KELYNGE, Chief Justice. It is fit that this cause be adjourned into the exchequer chamber for the opinions of all the Judges to be had in it (c): we know what heats there were betwixt LORD COKE and LORD ELLESMERE, which we ought to avoid (d).

(a) 3. Bl. Com. 53.

(b) See the Appendix to 3. Chan. Rep. 26.

(c) This Case was moved again in the king's bench to *Sir Matthew Hale*, on his being promoted to the chief seat in that court; and the parties discovering that, in his opinion, the matter was not

within the statute of *præmunire*, they dropped all further proceedings in the cause. S. C. 1. Lev. 241.

(d) See the history of the rise, progress, and termination, of this contest between the courts of king's bench and chancery, 3. Bl. Com. 53, 54.

Trinity Term, 22. Car. 2. In B. R.

Cafe 4.

Turner against Benny.

In an action on the case upon an agreement to surrender copyhold lands generally, an averment that the surrendered the lands into the hands of two tenants of the manor *secundum consuetudinem*, &c. is sufficient, without shewing the custom.

A WRIT OF ERROR was brought to reverse a judgment in the common pleas in an action upon the case, wherein the plaintiff declared, That it was agreed between himself and the defendant, that the plaintiff should surrender to the use of the defendant certain copyhold lands; and that the defendant should pay for those lands a certain sum of money: and then he sets forth, that he did surrender the said lands into the hands of two tenants of the manor out of court, *secundum consuetudinem*, &c.

EXCEPTION. The promise is, to surrender generally, which must be \* understood of a surrender to the lord or to his steward; and the declaration sets forth a surrender to two tenants, which is an imperfect surrender, *Cro. Car.* 299.

\* [ 62 ]

S. C. 1. Lev.

293.

S. C. 2. Keb.

666.

1. Roll. Abr.

499.

Cro. Eliz. 717.

Gilb. Eq. Rep.

8. 13. 78. 96.

121.

8. Mod. 352.

2. Ld. Ray.

1145.

1. Peer. Wms.

16. 61. 280.

330. 354. 443.

781.

2. Peer. Wms.

258. 261. 490.

3. Peer. Wms.

251. 283. 322.

358.

Hob. 88. 106.

9. Co. 76. a. b.

KELYNGE, Chief Justice. But in that case there are not the words "*secundum consuetudinem*," as in this case.

JONES. In Hilary Term 22. Car. 1. Roll 1735, in the case of *Treburn v. Purchas*, two points were adjudged: FIRST, That when there is an agreement for a surrender generally, then such a particular surrender is naught. SECONDLY, That the alledging of a surrender *secundum consuetudinem* is not sufficient; but it ought to be laid, that there was such a custom within the manor, and then, that according to that custom he surrendered into, &c. Accordingly is the case of *Diveret v. Ratcliffe*, *Cro. Eliz.* 185.

COLEMAN, contra. We do say, that we were to surrender generally; and then we aver, that actually we did surrender *secundum consuetudinem*; and if we had said no more it had been well enough: then the adding, "into the hands of two tenants, &c." I take it that it shall not hurt. Besides, we need not to alledge a performance, because it is a mutual promise; and he cited the case of *Camphugh v. Brathwait*, *Hob.* 88. 106.

TWISDEN, Justice. I remember the case of *Treburn*; he was my client; and the reason of the judgment is in *Combe's Case*, because the tenants are themselves but attornies. And they compared it to this case: I am bound to levy a fine; it may be done either in court or by commission, but I must go and know of the person to whom I am bound how he will have it, and he must direct me.—In the principal case the judgment was affirmed, *nisi*, &c.

Cafe 5.

Turner against Davies.

Easter Term, 22. Car. 2. Roll 576.

An administrator who obtains judgment in

A UDITA QUERELA. The point was this, viz. An administrator recovers damages in an action of trover and conversion, on a conversion in his own time, for goods of the intestate, cannot take out execution thereon, if the administration be afterwards revoked.—S. C. Co. Ent. 91. a. S. C. 2. Saund. 144. S. C. 2. Keb. 668. Yelv. 83. 125. Cro. Car. 138. 208. 227. Carter, 138. 6. Mod. 91. Fitzg. 202. 257. 10. Mod. 21. 389. 1. Vern. 25. Comyns, 18. 150. 2. Peer. Wms. 576. 3. Peer. Wms. 81. 83. 2. Ld. Ray. 1216. 1 Term Rep. 480.

version

Trinity Term, 22. Car. 2. In B. R.

version for goods of the intestate taken out of the possession of the administrator himself: then his administration is revoked, and the question is, Whether he shall have execution of the judgment notwithstanding the revocation of his administration?

TURNER  
against  
DAVID.

SAUNDERS. I conceive he cannot, for the administration being revoked, his authority is gone. *Doctor Drurie's Case*, in the *Eighth Report* (a), is plain; and there is a precedent in the *New Book of Entries* (b).

BARREL. I conceive he \* may take out execution, for it is not in right of his administration: he lays the conversion in his own time, and he might in this case have declared in his own name; and he cited and urged the reason of *Packman's Case*, 6. Co. 18. and *Cra, Eliz.* 460.

\* [ 63 ]

KELYNGE, *Chief Justice*. He might bring the action in his own name, but the goods shall be assets. If goods come to the possession of an administrator, and his administration be repealed, he shall be charged as executor of his own wrong. Now in this case, the administration being repealed, shall he sue execution to subject himself to an action when done?

TWISDEN, *Justice*. I think it hath been ruled, that he cannot take out execution, because his title is taken away.

THE COURT gave judgment against the defendant.

(a) 8. Co. 144.

(b) Co. Ent. 89.

Jordan against Martin.

Case 6.

Easter Term, 22. Car. 2. Roll 474.

EXCEPTION was taken to an avowry for a rent-charge, That the avowant having distrained the beasts of a stranger for his rent, does not say that they were *levant et couchant*.

If a landlord seize cattle for a heriot, or distrain them for rent, he need not shew that they were *levant et couchant*.

COLEMAN. The beasts of a stranger are not liable to a distress unless they be *levant et couchant*. Roll "*Distress*," 668, 672. *Reignold's Case*.

TWISDEN, *Justice*. Where there is a custom for the lord to seize the best beast for a *heriot*, and the lord does seize the best beast upon the tenancy, it must come on the other side to shew that it was not the tenant's beast.

S. C. 2. Keb. 669.  
2. Show. 328, 329.  
1. Saund. 27.  
222. 346.  
2. Saund. 227.  
289, 290. 325.  
Co. Lit. 47.

KELYNGE, *Chief Justice*. The cattle of a stranger cannot be distrained, unless they were *levant et couchant*; but it must come on the other side to shew that they were not so.

THE COURT, therefore, gave judgment for the defendant (a).

216. Nels. Litw. 203. 416. 425. 433. to 436. Free. in Ch. 7. 1. Ld. Ray. 170. 644. 726.

(a) It is said S. C. 2. Keb. 669. that judgment was given for the plaintiff.

Trinity Term, 22. Car. 2. In B. R.

Case 7.

Wayman *against* Smith.

Rule granted to shew cause, why a prohibition should not go to an inferior court, on a suggestion that the cause of action arose out of its jurisdiction.

\* [ 64 ]

S. C. 2. Keb. 673.  
S. C. 1. Sid. 464.  
S. C. 1. Vent. 88.  
Ante, 32.  
Post, 81.

J. Lev. 50. 69.  
96. 104. 137.  
153. 208. 289.  
2. Mod. 131.  
1408. 1. Peer. Wms. 43. 476.

A PROHIBITION was prayed to the court of *Bristol* upon this suggestion, viz. That the cause of action did not arise within the jurisdiction of the court.

WINNINGTON. There was a case here of *Smith v. Bond*, in *Hilary Term*, 17. Car. 2. Roll 501. on a prohibition to *Marlborough*; the suggestion grounded on *Westminster* 1. cap. 34. granted; and there needs not a plea in the spiritual court to the jurisdiction: for that he cited \* *F. N. B.* 49. But he said, he had an *affidavit*, that the cause of action did arise out of their jurisdiction.

TWISDEN, *Justice*. I doubt you must plead to the jurisdiction of the court. I remember a case here, wherein it was held so; and that if they will not allow it, then you must have a prohibition.

WINNINGTON. *Fitzberbert* is full.

RULED, That the other side shall shew cause why a prohibition should not go, and things to stay (a).

1. Saund. 74. 2. Inst. 230. 12. Mod. 135. 172. 206. 435. 445. 2. Ld. Ray. 1408. 1. Peer. Wms. 43. 476.

(a) In S. C. 2. Keb. 673. it is said, the prohibition was *denied*. In S. C. 1. Sid. 464. it is said, that it was *granted*. And S. C. 1. Vent. 88. leaves the matter *undetermined*.—*Sed quere*, If this is not the case alluded to by HALE, *Chief Justice*, in *Cox v. St. Alban's*, where he says, that the Courts will not grant a prohibition upon a mere surmise that the matter is out of the jurisdiction, Post. 81. for the party must avail himself of this defect in the court

below, Cowp. 20. But if, after imparlance, a *plea* be tendered and refused, Post, 81. Ld. Ray. 884. Cowp. 166. or if *want of jurisdiction appear upon the face of the proceedings*, a prohibition shall go, Dougl. 378. even to a court of appeal after the suit is remitted to the court below, and costs awarded against the appellant, 1. Term Rep. 552. and without imposing any term on the party applying for it, 3. Term Rep. 315. See 4. Term Rep. 352.

Case 8.

Humlock *against* Blacklow.

Easter Term, 21. Car. 2. Roll 288.

If A. covenant that he will not use such a trade, and in consideration of the performance thereof B. covenants to pay him an annuity, this is not a condition precedent, but a negative covenant.

S. C. 2. Saund. 155. S. C. 1. Sid. 464. S. C. 2. Keb. 674. 2. Mod. 33. 75. 1. Vent. 41. 2. Saund. 166. 10. Mod. 189. 154. 222. 420. 12. Mod. 455. 503. 8. Mod. 42. Comyns, 2:8. 231. 513. 1. Ld. Ray. 665. 2. Ld. Ray. 766. 1. Strange, 459. 535. 569. Dougl. 684. 689. 1. Term Rep. 638. 645.

DEBT upon a bond for performance of covenants in articles of agreement. The plaintiff covenanted with the defendant to assign over his trade to him, and that he should not endeavour to take away any of his customers; and in consideration of the performance of these covenants, the defendant did covenant to pay the plaintiff sixty pounds *per annum* during his life.

SAUNDERS. The words "*in consideratione performanceis*" make it a condition precedent; which must be averred, 3. Leon. 219. and those covenants must be actually performed.

TWISDEN,

Trinity Term, 22. Car. 2. In B. R.

TWISDEN, *Justice*. How long must he stay then, till he can be entitled to his annuity? As long as he lives; for this covenant may be broken at any time. That is an exposition that corrupts the text.

HUMLOCK  
against  
BLACKLOW.

THE COURT gave judgment for the plaintiff.

Wingfield's Case.

Case 9.

IT was moved by one HUNT, that the *venue* might be changed in an action of *indebitatus assumpsit* brought by Mr. Wingfield.

A barrister may lay his *venue* in *Middlesex*, and the Court will not change it on the usual affidavits.

JONES. I conceive it ought not to be changed, being in the case of a *counsellor at law*, by reason of his attendance upon this Court.

TWISDEN, *Justice*. In Mr. Bacon's Case of Gray's Inn, they refused to change the *venue* in the like case.—So the rule was not granted.

2. Vent. 47.  
2. Show. 176.  
242.  
2. Salk. 668.  
670.

Fitzg. 40. 1. Ld. Ray. 342. 399. 533. 702. 2. Ld. Ray. 1556. 2. Stra. 822. 6. Mod. 123.

The King against Morris.

Case 10.

AN INDICTMENT against one Morris in *Denbighshire*, for murder, was removed into the king's bench by *certiorari*, to prevent the prisoner's being acquitted at THE GRAND SESSIONS; and the Court directed to have an indictment found against him on the statute 26. Hen. 8. c. 6. in the next *English county*, viz. at *Shrewsbury*.

On an indictment for murder being removed from *Wales*, the Court may direct it to be tried in the

next *English county*.—S. C. 2. Keb. 681. 685. 724. 797. S. C. post. 68. S. C. 1. Vent. 93. 146. 1. Ld. Ray. 581. 2. Ld. Ray. 836. 2. Stra. 704. Dougl. 262. 751. 2. Term Rep. 125. 3. Term Rep. 658.

See the 34. & 35. Hen. 8. c. 26.

\* [ 65 ]

\* Taylor and Rouse, Churchwardens of Downham, against their Predecessors.

Case 11.

THE ACTION was to make them account for a bell. They plead, that they delivered it to a bell-founder to mend, and that it is yet in his hands. The plaintiff demurs.

In an action by churchwardens against their predecessors for taking a bell, they may plead that it is at the founder's; but it must be laid

The cause of his demurrer was, That this was no good plea in bar of the account, though it might be a good plea before auditors, 1. Roll. Abr. 121.

PEMBERTON. I conceive it is a good plea, for wherever the matter or cause of the account is taken off, the plea is good in bar. But he urged, that the action was brought for taking away

*bona parochianorum*.

S. C. 1. Vent. 88. S. C. 2. Keb. 675. 704. S. C. 1. Danv. 223. Aule, 41. 1. Roll. Abr. 118. 121. 1. Vent. 89. 10. Mod. 22. Fitzg. 44. 1. Stra. 680.

Trinity Term, 22. Car. 2. In B. R.

CHURCH-  
WARDENS  
against  
THEIR PREDE-  
CESSORS.

"*bona ecclesie*," and not "*bona parochianorum*," as it ought to have been.

THE COURT. The property is not well laid; so ordered to mend all, and plead *de novo*.

Memorandum.

Rayn. 133.

IN this Term HUGH WYNDHAM, *Serjeant at Law*, was made a Baron of the Exchequer.

MICHAELMAS

# MICHAELMAS TERM,

The Twenty-Second of Charles the Second,

I N

The King's Bench.

Monday, 24. October, 1670.

Sir John Kelynge, *Chief Justice.*

Sir Thomas Twisden, *Knt.*

Sir William Moreton, *Knt.*

Sir Richard Rainsford, *Knt.*

} *Justices.*

*Raym. 189.  
2. Keb. 684.*

Sir Heneage Finch, *Knt. Attorney General.*

Sir Edward Turner, *Knt. Solicitor General.*

*N. B. KELYNGE was sick of an Ague the whole Term, of which he died on the Effoin Day of the Easter Term following.*

\* [ 66 ]

\* The King *against* the Inhabitants of East Grinstead. Case 12.

**A**N INQUISITION was returned upon the statute of *Merton*, 20. *Hen. 3.* c. 4. and the statute of *Westminster* 2. 13. *Edw. 1.* c. 46. against pulling down inclosures; and the parties took issue as to the damages only.

It was moved, that before the trial for the damages there might be judgment given to have them set up again, having been long down.

On the return of a *distringas* to a *nestator*, if the villis plead to the damages only, there shall be judgment for repair until enquiry executed.

*S. C. 2. Keb.*

663. 683. 723. *S. C. Tremain, 348. Lutw. 157. Cro. Car. 280. 1. Cro. 380.*  
*2. Roll. Abr. 293. 20. Mod. 157. 1. Ld. Ray. 616.*

F 3

TWISDEN,

Michaelmas Term, 22. Car. 2. In B. R.

THE KING  
against  
EAST  
GRINSTEAD.

TWISDEN, *Justice*. When you have judgment for the damages, then one *distingas* will serve for setting up the inclosure (a) and the damages too; as in an action where part goes by *default* and the other part is *traversed*, you shall not take out execution till that part which is *traversed* be tried.



(a) See 29. Geo. 2. c. 36. and 32. Geo. 2. c. 41.

Case 13.

Anonymous.

A witness subpoena'd is protected from arrest *eundo et redeundo*.

S. C. 1. Vent. 11.

20. Hen. 6. pl. 4. 2. Roll. Ab. 273. 10. Mod. 333. Brownl. 15. Raym. 101. 2. Mod. 181. 1. Ch. Rep. 92. 2. Salk. 44. Gilbert's Com. P. 207. 2. Black. Rep. 2113. Tidd's Prac. 51. And see the case of Meekins v. Smith, H. Bl. Rep. 636. ; and Kinder v. Williams, 4. Term Rep. 377.

UPON a motion by MR. DOLBEN for an attachment, TWISDEN, *Justice*, said, If a man has a suit depending in this court, and be coming to town to prosecute or defend it here, he cannot be sued elsewhere: but if a man come hither as a witness, he is protected *eundo et redeundo*.

Case 14.

Wootton against Heal.

In covenant on a warranty against all persons, a breach assigned that A. having lawful title entered, &c. without shewing what his title was, is erroneous.

S. C. post. 290. S. C. 2. Saund. 177. S. C. 1. Lev. 301.

\* [67] S. C. 1. Sid. 466. S. C. 2. Keb. 684. 703. 709.

723. Post. 101. 2. Lev. 37. 194.

3. Lev. 325. Cro. Jac. 444. 2. Mod. 213. 3. Mod. 135. Comyns, 146. 180. 230. 333. 476. 627.

2. Strange, 1011. Dougl. 43. H. Bl. Rep. 275. 1. Term Rep. 671. 3. Term Rep. 584.

AN ACTION OF COVENANT was brought upon a warranty in a fine, a term for years being evicted.

SAUNDERS. I acknowledge that an action of covenant does well lie in this case; but the plaintiff assigns his breach in this, viz. That one Stowell, having lawful right and title, did enter upon him and evict him, which perhaps he did by virtue of a title derived from the plaintiff himself.

JONES, *contra*. To suppose that Stowell claimed under the plaintiff is a foreign intendment; and it might as well come on the defendant's side to show it: and since the case of Kirby v. Hansaker (a), the statute of 21. Jac. 1. c. 13. and the late act of 16. and 17. Car. 2. c. 8. have much strengthened verdicts.

TWISDEN, *Justice*. The statutes of *Jeofails* do not help \* when the Court cannot tell how to give judgment. The plaintiff ought to entitle himself to his action; and it is not enough for the jury to entitle him.

JONES. You have waived the title here, and relied upon the entry of the issue only, which is "*non intravit, &c.*"

CURIA *advizare vult*.—

Afterwards, on this case being moved and argued again, THE COURT arrested the judgment, and awarded a *nil capiat per billam* against the plaintiff.

(a) Cro. Jac. 315.

Laffels

Michaelmas Term, 22. Car. 2. In B. R.

Laffels *against* Catterton.

Case 15.

**A**N ACTION OF COVENANT for further assurance, the covenant being to make such conveyance, &c. as counsel should advise. They alledge for breach, that they tendered such a conveyance as was advised by counsel, *viz.* a lease and release, and set it forth with all the usual covenants.

LEVINZ for the defendant moved in arrest of judgment—I conceive they have tendered no such conveyance as we are bound to execute; for we are not obliged to seal any conveyance with covenants, nor with a warranty. Besides, that which they have tendered has a warranty, not only against the covenantor, but one *Wilson. Cro. Jac. 571. 1. Roll. Abr. 424.* Again, our covenant is, to convey all our lands in *Bomer*; and the conveyance tendered is, of all our lands in the lordship of *Bomer*.

TWISDEN, *Justice.* For the last exception, I think we shall intend them to be both one: and I know it hath been held, that if a man be bound to make any such reasonable assurance as counsel shall advise, usual covenants may be put in; for the covenant shall be so understood. But there must not be a warranty in it: though some have held, that there may be a warranty against himself: but I question whether that will hold.

But WESTON, on the other side, said, that the objection as to the warranty was fatal, and he would not make any defence.

1. *Ld. Ray. 36. 402.* 2. *Ld. Ray. 750. 1095.* 1. *S. C. 1. Sid. 467.* 2. *S. C. Ray. 190.* 3. *S. C. 2. Keb. 685.* 1. *Roll. Abr. 424.* *Cro. Jac. 571.* 2. *Danv. 36.* *Owen, 65.* 1. *Ro. Rep. 71.* 2. *Ro. Rep. 91.* 1. *Leon. 29.* *Gilb. Fq. Rep. 108. 166. 252.* 12. *Mod. 399.* *Com. Dig. 454.*

\* [ 68 ]

\* The King *against* Morris.

Case 16.

**M**R. ATTORNEY FINCH shewed cause why a *certiorari* should not be granted to remove an indictment of murder out of *Denbighshire* in *Wales*.

TWISDEN, *Justice.* In the second and eight years of *Charles* the First it was held, that a *certiorari* did lie in *Wales*.

MORETON, *Justice.* By 34. & 35. *Hen. 8. c. 26.* the Justices of THE GREAT SESSIONS have power to try all murders, as the Judges here have; and the statute of 26. *Hen. 8. c. 6.* for the trial of murders in the next *English* county, was made before that of the 34. & 35. *Hen. 8. c. 26.*

TWISDEN, *Justice.* I never yet heard that the statute of 34. *Hen. 8. c. 26.* had repealed that of the 26. *Hen. 8. c. 6.* It is true, the Judges of THE GRAND SESSIONS have power, but the statute that gives it them, does not exclude this Court.—To be moved when the Chief Justice should be in court.

2. *Hawk. P. C. 316.* 1. *Ld. Ray. 581. 836. 1408.* 1. *Str. 353. 630. 704.* 2. *Str. 945.* *Dougl. 751.* 3. *Term Rep. 658.* 1. *S. C. ante, 64.* 2. *S. C. 2. Keb. 681. 685. 724.* 797. 1. *S. C. 1. Vent. 93. 146.* 1. *Lev. 291.* *Vaugh. 395.* *Raym. 206.* 2. *Saund. 193.* 1. *Mod. 10.* 8. *Mod. 135.* 146. 12. *Mod. 643.*

Michaelmas Term, 22. Car. 2. In B. R.

Cafe 17.

Franklyn's Cafe.

If a statute direct a commitment by two justices, a warrant for such purpose by one justice only is bad.

Ante, 13.

Burr. S. C. 136.

2. Bl. Rep.

1017.

3. Term Rep.

1017.

FRANKLYN was brought into court by *habeas corpus*; and the return being read, it appeared that he was committed upon the statute 17. Car. 2. c. 2. f. 5. as a preacher at seditious conventicles.

COLEMAN prayed he might be discharged. He said, this commitment must be upon the *Oxford Act*; for the last Act only orders "a conviction;" and the Act for Uniformity of 12. Car. 2. c. 17. "a commitment only after the bishop's certificate." But the *Oxford Act* provides, "That it shall be done by two justices of the peace, upon oath made before them;" and in this return but one justice of peace is named; for *Sir William Palmer* is mentioned as deputy-lieutenant, and you will not intend him to be a justice of peace; nor does it appear that there was any oath made before them.

TWISDEN, *Justice*. Upon the statute of the 18. Eliz. c. 5. which appoints, "that two justices shall make orders for the keeping of bastard children, whereof one to be of the *quorum*," I have got many of them quashed, because it was not expressed that one of them was of the *quorum* (a).—Whereupon *Franklyn* was discharged.

(a) But now by the 26. Geo. 2. c. 27. "No warrant or other instrument made or executed by two justices which doth not express that one is of the *quorum* shall be vacated for that defect only." And by 7. Geo. 3. c. 21. "All acts, &c. executed by two justices qualified to act within such cities and liberties as have only one justice of the *quorum*, shall be valid and effectual in law, as if one of the said justices had been of the *quorum*."—See 1. Black. Com. 361.

\* [ 69 ]

Cafe 18.

\* Anonymous.

*Oyer* cannot be demanded after the expiration of the term in which the *profer* is made.

UPON a motion for time to plead in a great cause about brandy, TWISDEN, *Justice*, said, If it be *in bar*, you cannot demand *oyer* of the *letters patents* (a) the next Term; but if it be in a *replication*, you may; because you mention the precedent Term in *THE BAR*, but not in the *replication*.

1. Saund. 8. Dyer, 29. 5. Co. 75. Lane, 39. 12. Co. 95. 1. Ld. Ray. 84. 347. Salk. 119. Barnes Notes, 158. 163. 169. 185. 234. 250.—(a) See the case of *Rex v. Amery*, 1. Term Rep. 149. Dougl. 215. 477. where this case is recognized as law.

Cafe 19.

Yard against Ford.

An action will lie for erecting a market to the injury of the plaintiff's market, although they were held on different days.—S. C. 2. Saund. 172. S. C. 1. Lev. 296. S. C. 1. Vent. 98. S. C. Ray. 195. S. C. 2. Keb. 689. 706. 1. Roll. Abr. 117. 2. Roll. Abr. 140. 10. Mod. 258. 354. 11. Mod. 67.

JONES moved in arrest of judgment. An action upon the case was brought for keeping a market without warrant, it being in prejudice of the plaintiff's market. The action, he said, would

not

Michaelmas Term, 22. Car. 2. In B. R.

lie, because the defendant did not keep his market on the same day that the plaintiff kept his; which he said is implied in the case in 2. Roll. 140.

YARD  
against  
FORD.

LAUNDERS *contra*. Upon a writ of *ad quod damnum*, they enquire of any markets generally, though not held the same day. In this case, though the defendant's market be not held the same day as our's is, yet it is a damage to us in forestalling our market.

TWISDEN, *Justice*. I have not observed that the day makes difference. If I have a fair or market, and one will erect a stall to my prejudice, an action will lie; and so of a ferry. It is true, for one to set up a school by mine, is *damnum absque injuria*.—Ordered to be moved again, and afterwards judgment was given for the plaintiff.

Cock against Honychurch.

Case 20:

Michaelmas Term, 22. Car. 2. Roll 835.

AWLET moved in trespass, that the defendant pleaded in bar, that he had paid three pounds, and made a promise to pay so much more in satisfaction; and said it was a good plea, and did amount to an accord with satisfaction; an action being but a contract, which this was.—TWISDEN, *Justice*. An accord executed and admissible in bar, but *executory* not.

Payment of part, and a promise to pay the remainder, of a debt, cannot be pleaded as an accord and satisfaction.

. Ray. 203. 3. C. 2. Keb. 690. Ante, 7. 9. Co. 79. 1. Roll. Abr. 129. 4. Mod. 89. Mod. 290. 345. 20. Mod. 224. Gilb. Eq. Rep. 89. 1. Ld. Ray. 122. 1. Stra. 23. 426. 1. Peetr. Wms. 324. 2. Peetr. Wms. 343. 533. (624.) (626.). 3. Peetr. Wms. 225. 245. 2. Com. Dig. "Accord" (B 4.).

The King against Allen.

Case 21.

TWISDEN, *Justice*. There are two clauses in the statute of 37. Hen. 8. c. 9. of usury: If there be a corrupt agreement at the time of the lending of the money, then the bonds and all assurances are void; but if the agreement be good, and afterwards he receives more than he ought, then he forfeits the treble value (a).

In usury the corrupt agreement makes the contract void, and the taking of illegal interest incurs the penalty.

1. Vent. 38. S. C. Ray. 196. 3. C. 2. Keb. 690. 1. Sid. 421. 1. Saund. 295. Mod. 307. Comyns, 583. 2. Ld. Ray. 1144. Caf. Tem. Talb. 39. 2. Stra. 816. 2043. 3. 10. Mod. 449. 11. Mod. 174. 32. Mod. 385. 493. 517. Barnes, 51.

1) See 3. Atk. 154. 1. Hawk. 859. Cowp. 728. and the case of Lord Irnham v. Child, 1. Brown Rep. Chan. 93. and 1. H. Bl. Rep. 482. Morle v. Wilson, 4. Term Rep. 353. and the statute of the 23. Ann. c. 16.

Cafe 22.

\* Bonnefield's Cafe.

Mishomer cannot be pleaded to the writ of *excommunicato capiendo*.

Cro. Car. 199.  
20. Mod. 65.  
279. 350.  
22. Mod. 69.

275. 418. 517. 580. 11. Mod. 83. 112. 173. 191. 1. Ld. Ray. 619. 701. 2. Ld. Ray. 817. 789. Comyns, 541. 1. Vern. 24. 1. Peer. Wms. 435. 3. Peer. Wms. 53. 2. Strange, 43. 76. 265. 2. Stra. 946. 1067. 1189. 1218.

**B**ONNEFIELD was brought into court upon a *capias excommunicato*; and it was urged by PAWLET, that he might be delivered, for that his name was *Bonnefield*, and the *capias excommunicato* was against one *Bromfield*.—TWISDEN, *Justice*. You cannot plead that here to a *capias excommunicato*. You have no day in court, and we cannot bail upon this; but you may bring your action of false imprisonment.

Cafe 23.

Caterall against Marshall.

In *case* on a promise to give a bond with sufficient penalty, the omission of stating the penalty is bad on demurrer, but good after verdict.

S. C. 1. Keb. 691.  
S. C. 1. Lev. 297.

S. C. 1. Vent. 99.  
1. Sid. 270.

4. Burr. 2471.  
2. Term Rep. 388.

3. Term Rep. 65.

**A**CTION UPON THE CASE, in the common pleas; wherein the plaintiff declares, That in consideration that he would give the defendant a bond of sufficient penalty to save him harmless, he would, &c. and sets forth, that he gave him a bond with sufficient penalty; but does not express what the penalty was. This was moved in arrest of judgment.

JONES. After a verdict it is good enough; as in the case of *Austin v. Gervaise*, *Hob.* 69.

TWISDEN, *Justice*. If it had been upon a demurrer, I should not have doubted but that it had been naught.

RAINSFORD and MORETON, *Justices*. But the jury have judged the penalty to be reasonable, and have found the matter of fact.

TWISDEN, *Justice*. The jury are not judges what is *reasonable* and what *unreasonable* (a): but this is after a verdict.—And so the judgment was affirmed, the cause coming into the king's bench upon a writ of error.

(a) See ante, note (a), page 27, *Butler v. Play*.

Cafe 24.

Martin against Delboe.

To an *assumpsit* on a promise to pay so much out of the net proceeds of

\* [ 71 ]

goods, the defendant may plead, that "the cause of action

**A**N ACTION UPON THE CASE setting forth, That the defendant was a merchant, and transmitted several goods beyond sea; and promised the plaintiff, that if he would give him so much money, he would pay him so much out of the proceed of such a parcel of goods as he was to receive from \* beyond sea. The defendant pleaded the statute of limitations, and doth not say, *non assumpsit infra sex annos*, but that "the cause of action did not arise within six years." The plaintiff demurs, Because the cause is between merchants, &c.

"did not arise within six years;" for this is not within the exception of 21. Jac. 1. c. 16.—S. C. 1. Keb. 674. 696. 717. S. C. 1. Sid. 465. S. C. 1. Vent. 89. S. C. 1. Lev. 298. Post. 89. 168. 2. Saund. 125. 2. Mod. 312. 1. Lev. 287. Abr. Eq. 304. 1. Vern. 695. 22. Mod. 579. 1. Stra. 536. 2. Stra. 836. 1. Peer. Wms. 742.

SYMPSON.

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SYMPSON. The plea is good. Accounts within the statute must be understood of those that remain in the nature of accounts: now this is a sum certain.

MARTIN  
against  
DALLON.

JONES *accorded*. This is an action upon the case, and an action upon the case between merchants is not within the exception: and the defendant has pleaded well in saying, that "the cause of this action did not arise within six years;" for the cause of action riseth from the time of the ship's coming into port, and the six years are to be reckoned from that time.

TWISDEN, *Justice*. I never knew but that the word "accounts" in the statute was taken only for actions of account. An *infirmul computasset* brought for a sum certain upon an account stated, though between merchants, is not within the exception.—So judgment was given to the defendant (a).

(a) This case was adjourned, S. C. 2. Vent. 90. upon a doubt, whether this appeared sufficiently on the declaration to be an account stated between these parties, S. C. 1. Sid. 465. and the Court, though after argument, permitted the plaintiff to discontinue, S. C. 1. Lev. 298. in order that he might bring an action of account. S. C. 2. Keb. 717.

The King against Leginham.

Case 25.

Easter Term, 20. Car. 2. Roll 163.

AN INFORMATION was exhibited against him for taking unreasonable distresses of several of his tenants.

Neither an information nor indictment will lie for taking an excessive distress: the remedy is by action on the statute of Marlbridge. An indictment charging a man to be *communis oppressor* is too general.

JONES moved in arrest of judgment, FIRST, That an information would not lie for such cause. The statute of Marlbridge, c. 4. saith, that if the lord take an unreasonable distress he shall be amerced, so that an information will not lie: and my LORD COKE upon MAGNA CHARTA says, the party grieved may have his action upon the statute.

SECONDLY, But admitting that an information would lie, yet it ought to have been more particular, and to have named the tenants; for it is not sufficient to say in general, that he took unreasonable distresses of several of his tenants.

THIRDLY, The second part of the information, viz. that he is *communis oppressor*, is not sufficient, Roll. 79. Moor. 451.

TWISDEN, *Justice*. It hath so been adjudged, that to lay in an information that a man is *communis oppressor* is not good (a); and a lord cannot be indicted for an excessive distress, for it is a private matter, and the party ought to bring his action.—To stay.

224. 2. Inst. 107. 6. Mod. 173. 289. 311. 7. Mod. 52. 1. Sid. 62. 282. Fitzg. 85. 2. Hawk. P. C. 301.

S. C. post. 282.  
S. C. 1. Lev. 299.  
S. C. Ray. 193.  
205.  
S. C. 1. Vent. 97. 104.  
S. C. 2. Keb. 687. 697.  
S. C. Freeman.  
1. Salk. 382.

(a) 1. Lev. 203. 1. Keb. 278. 1246. ; and see 2. Hawk. P. C. 322. 2. Show. 389. Strange, 369. 849. and the cases there cited,

Haman

Case 26.

\* Haman *against* Truant.

Trinity Term, 22. Car. 2. Roll 710.

On *assumpsit* for goods sold, if the defendant plead a prior action on the same contract, the plaintiff may traverse the identity of the contracts, and conclude with a verification.

**A**N ACTION UPON THE CASE brought upon a bargain for corn and grass, &c. The defendant pleads another action depending for the same thing. The plaintiff replies, that the bargains were several; *ABSQUE HOC*, that the other action was brought for the same cause. The defendant *denies specially*, for that he ought to have concluded *to the country*.—*POLLEXFEN*. When there is an affirmative, they ought to make the next an issue, or otherwise they will plead *in infinitum*, *Huish v. Phillips*, *Cro. Eliz.* 755.—And accordingly judgment was given for the defendant (a).

S. C. 2. Keb. 692. S. C. Ray. 199. S. C. 1. Vent. 101. Co. Lk. 116. 1. Lev. 131. Cro. Car. 164. Yelv. 38. 1. Saund. 102. 2. Saund. 73. 189. 1. Ld. Ray. 163. 2. Ld. Ray. 787. 303. 2. Sta. 1177.

(a) The *traverse* in this case was held good, because it put the matter more singly in issue, S. C. 1. Vent. 101. This course of pleading is said to be the constant practice, S. C. Ray. 199.; and a *respondens* *ofter* was awarded, S. C.

2. Keb. 692. See Carth. 300. Cro. Eliz. 754. 2. Salt. 4. 2. Sid. 523. 2. Saund. 156. 1. Burr. 326. 2. Burr. 1022. 2. Sum. 871. Dougl. 94. 499. 2. Term Rep. 439.

Case 27. Foxwift and Others, Executors of Pinsent, *against* Tremain.

Where there are several executors, they may all sue by attorney, though some of them be under age. S. C. ante, 47. S. C. post, 296. S. C. Ray. 198. S. C. 1. Sid. 447. S. C. 2. Saund. 112. S. C. 1. Vent. 102. S. C. 2. Keb. 537. 625. 633. 691. S. C. 1. Lev. 199. 1. Lev. 131. 2. Lev. 38. 239. 2. Roll. 207.

**I**NDEBITATUS ASSUMPSIT. The defendant pleads, that two of the plaintiffs are infants, and yet they all sue by attorney.

The question is, If there be two executors and one of them under age, Whether the infant must sue by guardian, and the other by attorney? or, Whether it is not well enough if both sue by attorney?

OFFLEY spake to it, and cited *Bade v. Sterker*, *Cro. Eliz.* 342. *Cotton v. Wotton*, 1. Rol. 288. *Powel's Case*, *Style* 318. *Ca. Lit.* 157. and *Dyer* 338.

MORETON, *Justice*. I am of opinion that he may sue by attorney, as executor; though if he be defendant he must appear by guardian.

RAINSFORD, *Justice*. I think it is well enough, and I am led to think so by the multitude of authorities in the point; and I think the case stronger when infants join in actions with persons of full age: he sues here *in autre droit*, and I have not heard of any authority against it.

TWISDEN, *Justice*, concurred with the rest; and so judgment was given.

\* Moreclack against Carleton.

Cafe 28.

Trinity Term, 22. Car. 2. Roll 1402.

UPON A WRIT OF ERROR out of the court of common pleas, If a *relicta* writ, one error assigned was, That upon a *relicta verifications* a *misericordia* was entered, whereas it ought to have been a *capiatur*. entered after *non est factum*, the defendant shall only be amerced.

TWISDEN, *Justice*. The common pleas ought to certify to us what the practice of their court is.

MONDAY, the *Secondary*, said, It was always a *capiatur*. It is true, in the Year Book 9. *Edw.* 4. c. 24. it is said, that " he shall be amerced, because he hath spared the jury their pains ;" and the 34. *Hen.* 8. is accordingly : but, say they, in the common pleas a *capiatur* must be entered, because *didicit factum suum* ; so they said they would discourse with the Judges of the common pleas concerning it (a).

S. C. 2. *Secunda* 191.  
S. C. *Ray.* 199.  
S. C. 2. *Keb.* 683. 706.  
*Cro. Jac.* 64.  
2. *Ld. Ray.* 927.  
8. Co. 60.  
2. *Roll. Abr.* 324.

(a) By 16. & 17. Car. 2. c. 8. " No judgment after verdict, confession " by *cognovit assensum*, or *relicta verifications*," or by 4. & 5. Ann. c. 16: " No judgment upon confession, nihil *dicat*, or *non sum informatus*, shall be " reversed for want of a *misericordia* or " *capiatur*, or by reason that a *capiatur* is entered for a *misericordia*, or a " *misericordia* is entered where a *capiatur* ought to have been entered, &c." And by 5. Will. & Mary, c. 12. " No writ of *capias pro fine* in any action " of trespass, ejectment, assault, and " false imprisonment, shall be sued out " or prosecuted ; but the plaintiff in

" every such action shall, upon signing " judgment, over and above the usual " fees pay 6s. 8d. in satisfaction of the " said fine." THE PRACTICE therefore now is, in the court of common pleas, to enter, that the fine is remitted ; but in the court of king's bench no notice is taken of any fine or *capias* at all, *Salk.* 54. *Carth.* 390. But if judgment be for the defendant, then it is considered that the plaintiff and his pledges of prosecuting be nominally amerced for his false suit, and that the defendant *eat fine die*. See 3. *Black. Comm.* 399. *Annally & Rep.* 72.

The King against Holmes.

Cafe 29.

MOVED to quash an indictment of forcible entry into a messuage, passage, or way, for that a passage or way is no land nor tenement, but an easement : and then it is not certain whether it were a passage over land or water, *Yelv.* 169. The word " *passagium*" is taken for a passage over water.

An indictment for a forcible entry into a passage, is bad ; or into a messuage of which he was possessed for a certain term, without saying of years. S. C. 2. *Keb.* 709.  
8. *Mod.* 65.  
11. *Mod.* 529.  
235. 273.  
12. *Mod.* 268.  
417. 423. 498. 516.  
2. *Ld. Ray.* 610.  
4. *Salk.* 169.

TWISDEN, *Justice*. You need not labour about that of the passage, we shall quash it as to that. But what say you to the messuage ?

JONES. It is naught in the whole ; for it is but by way of recital, with a *quod cum* he was possessed, &c. *et sic possessionatus*, &c. —But that, TWISDEN, *Justice*, said was well enough.

JONES. Then he saith, that he was possessed *de quodam termino*, and doth not say *annorum*. —TWISDEN, *Justice*. That is naught. —The indictment was quashed.

1. *Hawk. P. C.* 246. 282. *Salk.* 260.

Michaelmas Term, 22. Car. 2. In B. R.

Cafe 39.

Barret *against* The Hundred of Stoak.

In an action of  
hue and cry  
against the  
hundred, poor  
inhabitants,  
though they  
pay no taxes,  
cannot be wit-  
nesses.

\* [ 74 ]

2. C. 2. Keb.

722.

1. Saund.

2. Mod. 60.

20. Mod. 150.

291.

21. Mod. 225.

261. 1. Peer. Wms. 596. 2. Vern. 317. Prec. in Ch. 234. Abr. Eq. 223. 1. Stra. 101.

652. 2. Stra. 1253. 2. Ld. Ray. 1353.

AN action was brought against the Hundred of *Stoak* upon the statute of *Hue and Cry*; and at the trial some house-keepers appeared as witnesses that lived within the hundred, who, being examined, said they were poor, and paid no taxes nor parish duties.

The question was, Whether they were good witnesses or not?

TWISDEN, *Justice*. Alms-people \* and servants are good witnesses, but these are neither.—Then he went down from the bench to the Judges of the common pleas to know their opinions; and at his return said, that JUDGE WYLDE was confident that they ought not to be sworn; and that JUDGE TYRRELL doubted at first, but afterwards was of the same opinion: their reason was, Because when the money recovered against the hundred should come to be levied, they might be worth something (a).

(a) By 8. Geo. 2. c. 16. s. 15. which recites, "that by the laws no persons inhabiting within the hundred can be admitted as a witness, by reason of the interest they may have," IT IS ENACTED, "That in any action against a hundred on the statutes of *hue and cry* any person inhabiting within the said hundred, or any franchise thereof, shall be admitted as a witness

"for or on behalf of the said hundred, in the same manner as if he or she were not an inhabitant thereof, but resided in any other hundred."—But by 22. Geo. 2. c. 24. "No person shall recover in any such action more than 200l. unless at the time of the robbery there be two persons present to attest the truth thereof."

EASTER

# E A S T E R T E R M,

The Twenty-Third of Charles the Second,

I N

The King's Bench.

Wednesday, May 10, 1671.

Sir Matthew Hale, *Knt. Chief Justice.*

Sir Thomas Twifden, *Knt.*

Sir William Moreton, *Knt.*

Sir Richard Rainsford, *Knt.*

} *Justices.*

Sir Heneage Finch, *Knt. Attorney General.*

Sir Edward Turner, *Knt. Solicitor General.*

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## Memorandum.

SIR MATTHEW HALE, *Chief Baron*, was sworn *Chief Justice* Hale appointed  
*Justice of the Court of King's Bench*, on *Thursday* the 18th Chief Justice.  
May 1671, in the place of SIR JOHN KELYNGE, deceased. Raym. 209.  
2. Keb. 751.

Hopkins *against* Robinson and Others.

Cafe 31.

*Hilary Term, 23. Car. 2. Roll 233.*

REPLEVIN. In this case these points were spoke to by A custom for  
POLLEXFEN in arrest of judgment, *viz.* the tenants of a

FIRST, Whether a custom to have a several pasture excluding the lord were a good custom or not? It was said, that a prescription to have common so was void in law; and if so, then a prescription to have sole pasture, which is to have the grafs by the mouth of the cattle, is no other than common appendant; the lord, is good.

S. C. 1. Vent. 163. 123. S. C. Pollexfen, 13. to 23. S. C. 2. Lev. 2. S. C. 2. Keb. 757. 843. 1. Saund. 352. 1. Vent. 383. Cro. Jac. 27. 44. Poph. 201. 1. Lev. 296. 1. Saund. 227. 343. 1. Mod. 185. 3. Mod. 162. 250. 3. Mod. 297. Comyns, 578. 3. Petr. Wms. 257. 1. Com. Dig. 429. Dougl. 218.

Daniel's

Easter Term, 23. Car. 2. In B. R.

**HERRING:  
against  
ROBINSON  
AND OTHERS.**

*Daniel's Case, Cro. Car. 542.* so that *common* and *pasturage* is one and the same thing. They say, that it is against the nature of common, for the very word "*common*" supposeth that the lord may feed. I answer, If that were the reason, then a man could not by law claim common for half a year, excluding the lord; which may be done by law. But the true reason is, that if that were allowed, then the whole profits of the land might be claimed by prescription, and so the whole land be prescribed for. The lord may grant to his tenants to have common, excluding himself; but such a common is not good by prescription.

**SAUNDERS contra.**—In case of a common, such a prescription is not good, because it is a contradiction, but here we claim *solam pasturam*. Now what may be good at this day by grant, may be claimed by prescription.

**HALE, Chief Justice.** Notwithstanding this prescription for the sole pasture, yet the soil is the lord's, and he has mines, trees, bushes, &c. and he may dig for turfs. And such a grant, viz. of the sole pasturage, would be good at this day. 18. *Edw. 3.* though a grant by the lord, that he will not improve, would be a void grant at this day.

**TWISDEN, Justice.** **LORD COKE** is express in the point. A man cannot prescribe for sole common, but may prescribe for sole pasture. And there is no authority against him. And for *levant et couchant*, it was adjudged in *Stoneby v. Muckleby (a)*, that after a verdict it was helped.

In pleading a prescription for a sole and several pasture, it is not necessary to say for beasts *levant et couchant*.

*Ante*, 6, 7-63.

*Welf. Lut.* 500, 501.

1. *Sid.* 313.

1. *Lev.* 196.

1. *Lev.* 2.

1. *Show.* 328.

329.

1. *Danv.* 798.

1. *Saund.* 27.

1. *Saund.* 227.

1. *Shower.* 318.

1. *Sira.* 1011.

1. *Ld. Raym.* 1130.

1. *Term Rep.* 147.

THE SECOND POINT was, Admitting that it be good, whether or no the prescription here not being for beasts *levant et couchant*, were good or not, for that a difference was made betwixt common in gross and common appendant, viz. That a man may prescribe for common in gross without those words, but not for common appendant. *Cro. Jac.* 256. 1. *Brownl.* 35. *Noy* 145. 15. *Edw. 4. fol.* 28. 32. *Roll. tit. "Common"* 398. *Fitz. tit. "Prescription,"* 51.

As to the exception, That we ought to have prescribed for cattle *levant et couchant*; it is true, if one doth claim common for cattle, *levant et couchant* is the measure for the common, unless it be for so many cattle in number: but here we claim the whole herbage, which perhaps the cattle *levant et couchant* will not eat up.

1. *Saund.* 27. 222. 305. 2. *Saund.* 227. 290. 315. 1. *Shower.* 318.

1. *Ld. Raym.* 1130. 3. *Term Rep.* 147.

(a) 1. *Sid.* 87.

A THIR

A THIRD POINT was, Whether or no these things \* are not helped by a verdict ?—As to that, it was alledged that they are defects in the title, appearing on record ; and that a verdict doth not help them (a). In replevin, if a licence by deed to a stranger to depasture his beasts on a sole pasture be omitted to be stated, and issue be joined on *the custom*, the omission is aided by the verdict. Dougl. 683.

Judgment was given accordingly for the plaintiff.

(a) This objection was, admitting the tenants of the manor had, under this custom, a right to *licence* a stranger to put in his cattle, that the plaintiff had not shewn the licence to be *by deed* ; and the case of *Monk v. Butler*, *Cro. Jac.* 574. was relied on to shew, that the plaintiff could not maintain his action for want of title. S. C. 2. Saund. 326. But it was said, that this was not laid as a *prescription in the tenants*, but as a *custom in the manor* ; and therefore title was not necessary to be shewn. S. C. 1. Vent. 124. 164. The Court were of opinion, that such *licence* could not be granted without *deed*. but that the issue being upon *the custom*, it was aided by the verdict. S. C. 2. Saund. 328.

# MICHAELMAS TERM,

## The Twenty-Third of Charles the Second,

I N

The King's Bench.

*Monday, 23. October, 1671.*

*Sir Matthew Hale, Chief Justice.*

*Sir Thomas Twisden, Knt.*

*Sir William Moreton, Knt.*

*Sir Richard Rainsford, Knt.*

}

*Justices.*

*Sir Heneage Finch, Knt. Attorney General.*

*Sir Edward Turner, Knt. Solicitor General.*

Case 32.

Gamble *against* Forreft.

To trespass, a justification under the process of an inferior court must shew *what court, and that the place and cause were within its jurisdiction.*

S. C. 2. Keb. 244.  
6. Mod. 233.  
8. Mod. 213.

Fitzg. 46. 85. 109. 10. Mod. 25. Salk. 404. 1. Saund. 73. 2. Ld. Ray. 1310. 2. Stra. 829.  
See the case of Rowland v. Veale, Cowp. 18. and Trevor v. Wall, 1. Term Rep. 151.

**A**N ACTION OF TRESPASS was brought for taking away a cup, till he paid him twenty shillings. The defendant pleads, that *ad quendam curiam* he was amerced, and that for that the cup was taken.

HALE, *Chief Justice.* We cannot tell what court it is, whether it be a court-baron by grant or prescription: if it be by grant, then it must be *coram seneschallo*; if by prescription, it may be *coram seneschallo*, or *coram sectatoribus*, or before both. THEN it does not appear, that the house where the trespass was laid, was within the manor: THEN he doth not say *infra jurisdictionem curie*. —It was put upon the other side to shew cause (a).

(a) It appears S. C. 2. Keb. 244. that judgment was given for the plaintiff.

Jacob

## \* Jacob Hall's Cafe.

## Cafe 33.

COB HALL, a rope-dancer, had erected a stage in *Lincoln's-Inn-fields*; but upon a petition of the inhabitants, there was prohibition from *Whitehall*: now, upon a complaint to the judges, that he had erected one at *Charing-cross*, he was sent for to court; and THE CHIEF JUSTICE told him, that he understood it as a nuisance to the parish: and some of the inhabitants being brought in, the court said, that it did occasion broils and fightings, and drew many rogues to that place, that they lost things out of their shops every afternoon.—And HALE, *Chief Justice*, said, that in the eighth year of Charles the First, NOY came into court, and prayed a writ to prohibit a *bowling-alley* erected near *St. Dunstan's Church*, and it (a).

A booth for rope-dancing erected in a street is a nuisance, for which the master and workman may be indicted; or the Judges may, upon view, order it to be abated. S. C. 2. Keb. 846. S. C. 1. Vent. 169.

10d. 142. 2. Roll. 109. 3. Inf. 205. 10. Mod. 336. 12. Mod. 342. 2. Burr. 1232. lawk. P. C. 362.

2) The Judges, upon view, caused a writ to be made of this nuisance; and ordered for the offender ordered him to enter into a recognizance not to proceed; he refusing to comply, the Court committed him for *contempt*, issued a writ to the sheriff, on the record made, to abate the building; and ordered him to be indicted for the offence. S. C. 1. Vent. 169.

## Sir Anthony Bateman's Cafe.

## Cafe 34.

[ At the trial at bar, the son and daughter of *Sir Anthony Bateman* were defendants: the action was an ejectment. The defendants admitted the point of *Sir Anthony's* bankruptcy, but set up a conveyance made by *Sir Anthony* to them for the payment of five hundred pounds a-piece, being money given to them by their grandfather *Mr. Russell*, to whom *Sir Anthony* took out administration.—HALE, *Chief Justice*. It is a voluntary conveyance, unless you can prove that *Sir Anthony* had goods in his hands of *Mr. Russell's* at the time of the executing it. So they proved that he had, and there was a verdict for the defendants.

A conveyance by an administrator to the niece of the intestate is fraudulent as against creditors, unless it be proved that he had assets in his hands. S. C. 1. Vent.

Post. 119. 2. Lev. 70. 146. 2. Show. 46. 2. Vern. 511. Prec. in Ch. 14. 84. 275. 377. 520. Abr. Eq. 148. 170. Caf. Temp. Talb. 65. 1. Ld. Ray. 286. 725. Comyns, 1. Peer. Wms. 404. 314. 3. Peer. Wms. 187. 298. Cowp. 434. 705. 2. Term Rep. 2. Brown's Chan. Cafes, 90. 148.

## \* Legg against Richards.

## Cafe 35.

EJECTMENT. Judgment against the defendant, who dies, and his executor brings a writ of error and is nonsuited: it is moved that he should pay costs.—TWISDEN, *Justice*. An executor is not within the statute for payment of costs *occasione litigationis*.—HALE, *Chief Justice*. I am of the same opinion. pay costs, though the judgment be affirmed.—S. C. 1. Vent. 166. 3. Lev. 375. 4. Mod. 245. Cro. Jac. 350. Cro. Car. 59. 8 Mod. 108. 11. Mod. 153. 174. 196. 256. Mod. 440. 1. Peer. Wms. 482. 2. Peer. Wms. 285. 297. 496. (658). Comyns, 162. Ld. Raym. 437. 2. Ld. Raym. 865. 1413. 1. Stra. 138. 682. 2. Stra. 871. 977. 1072. Peer. Wms. 181. 303. 347. 373. Barnes Notes, Run Eject. 147. Com. Dig. "Costs." 1). But see the case of *Williams v. Riley*, 1. H. Bl. Rep. 566. that in the common pleas executors and administrators are liable to costs in error in cases where they would be liable in the final action.

An executor who brings a writ of error on a judgment against his testator shall

Michaelmas Term, 23. Car. 1. In B. R.

Cafe 36.

The City of London *against* Harwood.

The court of aldermen in London may *fine* and *imprison* a man for marrying a *city orphan* without their consent.

S. C. post. 79.  
S. C. 2. Keb. 347.  
S. C. 1. Vent. 178.  
S. C. 2. Lev. 32.  
S. C. Tremain, 420.  
1. Lev. 162.  
1. Ch. Rep. 26.

**HARWOOD** was brought to the bar by *habeas corpus*, being committed by the court of aldermen for marrying an orphan without their consent.

**NORTH, Solicitor General.** We conceive the return insufficient, and that it is an unreasonable custom to impose a penalty on a man for marrying a city orphan in any place of *England*. Now we married her far from *London*, and knew not that she was an orphan. Then they have put a fine of forty pounds upon him; whereas there is no cause why he should be denied marriage with her, there being no disparagement.

**TWISDEN, Justice.** *Mr. Waller of Beaconsfield* was imprisoned six months for such a thing.—So the money was ordered to be brought into court.

Cafe 37.

Leginham *against* Porphery.

Trinity Term, 18. Car. 2. Roll 244.

A custom to commute suit and service at the lord's court for a sum certain is good; and a tender and refusal of the money is equal to payment.

S. C. 2. Keb. 344. 380. 847.  
S. C. 1. Sid. 361.

\* [ 78 ]

S. C. 1. Vent. 167.

1. Sid. 348.

10. Mod. 26.

81. 153. 282.

12. Mod. 84.

421. 441. 530.

Comyns, 116.

279.

1. Show. 129.

**REPLEVIN AND AVOWRY** for not doing suit. The plaintiff sets forth a *custom*, that if any tenant live at a distance, if he come at *Michaelmas* and pay eight-pence to the lord and a penny to the steward, he shall be excused for not attending; and then says, that he tendered eight-pence, &c. and the lord refused it, &c.

**POLLEXFEN.** I know no case where payment will do, and tender and refusal will not do.

**HALE, Chief Justice.** Have you averred, that there are sufficient copyholders that live near the manor?

**POLLEXFEN.** We have averred, that \* there are at least one hundred and twenty.

**HALE, Chief Justice.** Surely tender and refusal is all one with payment.

**TWISDEN, Justice.** An award is made, that *super receptionem decem librarum* a man should give a release; there tender and refusal is enough.—Judgment for the defendant (a).

Abr. Eq. 319. 1. Ld. Ray. 441. 686. 2. Ld. Ray. 964. 2. Peer. Wms. 378.

(a) Judgment was given for the plaintiff; for the Court were of opinion, that the custom was good and well pleaded. S. C. 1. Sid. 361. S. C. 1. Vent. 167. S. C. Keb. 344. 380.

Waldron

Michaelmas Term, 23. Car. 2. In B. R.

Waldron *against* Roscarriot.

Cafe 38.

Hilary Term, 22. & 23. Car. 2. Roll 225.

**ECTMENT.** A special verdict found a fine levied of all the conusor's land in *A.* and that he had lands in *B.*; that a tithing-man was appointed in *B.* but that the constables of *A.* exercised their authority not only in *A.* but in *B.* also.

If a fine be levied of lands in *A.* and the party hath lands also in *B.* yet if the constable of *A.* is also constable of *B.* all the lands shall pass; for in such case both places constitute the same vill.

**HALE, Chief Justice.** It is true, one parish may contain three: the parish of *A.* may contain the vills of *A.* *B.* and *C.* that when there are distinct constables in every one of them: but the constable of *A.* doth run through the whole, then is the whole but one vill in law; or where there is a tithing-man it may be one vill: but if the constable run through the tithing, then it is not one vill. I know where three or four thousand pounds a-year have been enjoyed by a fine levied of land in the vill of *A.* in which are five several hamlets, in which are tithings; but the constable of *A.* runs through them all, and upon that it was held good all. Here was a case of the constable of *Blandford-Forum*, wherein it was held, that if he had a concurrent jurisdiction with the rest of the constables, the fine would have passed the lands all: in some places they have tithing-men and no constables.

S. C. 2. Keb. 802. 821. 848.  
S. C. 1. Vent. 170.  
Ante, 13.  
Poph. 12.  
Savil, 97.  
2. Show. 75.  
2. Saund. 290.  
2. Danv. 148.  
5. Mod. 96. 127.  
6. Mod. 96.  
1. Salk. 175.  
381.

**COLLEXFEN.** *Lambard*, 14. is, that the constable and the tithing-man are all one.

**HALE, Chief Justice.** That is in some places: *Præpositus* is proper word for a constable, and *decennarius* for a tithing-man.

Anonymous.

Cafe 39.

**INDICTMENT** for retaining a servant without a testimonial from his last master. Moved to quash it, **FIRST**, Because it wants the words *contra pacem*. **SECONDLY**, Because they do not show in what trade it was.—So quashed.

Indictment quashed for want of *contra pacem*.

12. Mod. 195. Fitzg. 63. 266. 2. Ld. Ray. 1116. Dougl. 445.

Cro. Car. 584.

Anonymous.

Cafe 40.

**MOVED** to quash another indictment because the year of Our Lord, in the caption, was in *figures*.—**HALE, Chief Justice.** The year of the king is enough (*a*).

The year in the caption of an indictment must not be in figures,

it may be rejected as *surplusage*.—1. Sid. 40. 3. Keb. 301. 2. Lev. 102. 3. Peer. Wms. 496.  
range, 261. 698. 2. Strange, 865. 2. Hawk. P. C. 340. 1. Salk. 195.

) By 4. Geo. 2. c. 16. law in the like way of expressing numbers by figures shall be in *English*, and figures as have been commonly used, even in words at length, and not and with such abbreviations as are abridged; but by 6 Geo. 2. c. 14. commonly used in the English language they may be written or printed in the like way of expressing numbers by figures.

Case 41.

• Anonymous.

The spiritual court cannot enforce the payment of a rate made by the churchwardens only.

Post, 194. 5. Co. 63. 3. Term Rep. 3.

**M**OVED for a prohibition to the *spiritual court*, For that they sue a parish for not paying a rate made by the churchwardens only; whereas by the law the major part of the parish must join.—TWISDEN, *Justice*. Perhaps no more of the parish will come together.—COUNSEL. If that did appear, it might be something.

Case 42.

Skinner *against* Webb.

Error will lie to the exchequer-chamber on a *scire facias* in any action within 27. *Eliz*.

c. 8.—S. C. 2. Keb. 833. 843. S. C. 1. Vent. 168. Fitzg. 67. 3. Mod. 27. 10. Mod. 17. 142. 275. 281. 12. Mod. 105. 1. Ld. Ray. 97. 2. Ld. Ray. 954. 2. Stra. 1102. 1. Pet. Wms. 348. 351. 2. Term Rep. 46.

**H**ALE, *Chief Justice*. A writ of error will lie in the exchequer-chamber of a judgment in a *scire facias*, grounded upon a judgment in one of the actions mentioned in the 27. *Eliz*, c. 8. because it is in effect a piece of one of the actions therein mentioned.

# HILARY TERM,

The Twenty-Third and Twenty-Fourth of Charles  
the Second,

IN

The King's Bench.

*Tuesday, 23. January, 1672.*

*Sir Matthew Hale, Knt. Chief Justice,*

*Sir Thomas Twifden, Knt.*

*Sir William Moreton, Knt.*

*Sir Richard Rainsford, Knt.*

} *Justices.*

*Sir Heneage Finch, Knt. Attorney General.*

*Sir Edward Turner, Knt. Solicitor General.*

## Harwood's Case.

Case 43.

**H**ARWOOD was removed out of *London* by *habeas corpus*; the return was, That he was fined and committed there for marrying a city-orphan without the consent of the court of aldermen.

**FIRST EXCEPTION.** They do not say that the party was a citizen, or that the marriage was within the city; and they are not bound to take notice of a city-orphan out of the city, for their customs extend only to citizens in the city.

**SECOND EXCEPTION.** They have not shewed that we had reasonable time to shew cause why we should not be fined.

and, on refusal to pay the fine to the court, may commit the offender.—S. C. ante, 77. S. C. 2. Keb. 847. S. C. 1. Vent. 178. S. C. 2. Lev. 32. S. C. Tremain, 420. 1. Lev. 162. 2. Lev. 130. 1. Ch. Rep. 26. 1. Roll. Rep. 316. Co. Lit. 136. 3. Mod. 214. 9. Mod. 98. 12. Mod. 516. Abr. Eq. 261. Gilb. Eq. Rep. 172. Cases Temp. Talb. 59. 1. Stra. 168. 1. Peer. Wms. 696. 703. 2. Peer. Wms. 102. 112. 118. 561. 3. Peer. Wms. 116. 154.

# Hilary Term, 23. & 24. Car. 2. In B. R.

HARWOOD'S  
CASE.

TWISDEN, *Justice*. These objections are over-ruled in *Mr. Waller's Case*.

1. Bac. Abr.  
633.  
7. Viner Abr.  
213.

\* [ 80 ]

Afterward, in the same Term, WESTON spake to it. There are two matters upon which the validity of this return doth depend. *viz.* the custom; and the offence within the custom.—FIRST, The custom is laid, that time out of mind the court of aldermen have had power to set a reasonable fine upon such as should marry an orphan without their leave; and upon refusal to pay it, to imprison him. I conceive this custom, as it is laid, to be unreasonable: it ought to be locally circumscribed, and confined to THE CITY. 17. *Edw.* 4. 7. there was an action brought upon the statute of labourers, for retaining one that was the plaintiff's retained servant; the defendant pleaded in abatement, that there was no place laid where the plaintiff's retainer was; and this was held a good plea; for \* that if it were in another county than where the defendant retained him, it was impossible for the defendant to take notice of a retainer in another county: no more can we take notice who is a city-orphan in the county of *Kent*.—SECONDLY, They have returned a custom to imprison generally; but it should have been, that without reasonable cause shewn they might imprison, and the party have liberty to shew cause to the contrary.—THIRDLY, I conceive they have returned the fact as defective as the custom. They say, that he married her without their consent: they ought to have said, that he took her out of their custody; and your lordships will not intend, that she was in their custody when she was out of the city.

OFFLEY of the same side, and cited 21. *Edw.* 3. *Fitz. "Guard."* 31. *Moore v. Hussy*, *Hob.* 95. *The Weavers Company v. Brown*, *Cro. Eliz.* 803. *Dean's Case*, *Cro. Eliz.* 689. *Lander v. Brooks*, *Cro. Car.* 561. In all the cases it is returned, that they were freemen of the city.

MR. SOLICITOR NORTH, on the same side, cited *Day v. Savage*, *Moor* 871, *Hobart* 85.

MR. ATTORNEY-GENERAL on the other side said, That because it was impossible to give notice to all, therefore *ex necessitate rei*, they must take notice at their peril.

HALE, *Chief Justice*. The city has an interest in the orphan, wherever the orphan be (a). And for notice, he may enquire; there is no impossibility of his coming to the knowledge, whether she be an orphan or no; therefore if he take her, he takes her at his peril.

TWISDEN, *Justice*. And for the fine, such a fine was set in *Langham's Case*, and adjudged good (b). Let a citizen of London live where he will, his children shall be orphans.

1. Sid. 250.  
1. Vent. 139.  
Hut. 30  
2. Lev. 32. 162.

HALE, *Chief Justice*. Some things are local in themselves; some things adherent to the person, and follow the person: now this

## Hilary Term, 23. & 24. Car. 2. In B. R.

as an interest which follows the person, and is transmitted to children; and the party must take notice of it at his peril.

HARWOOD'S  
CASE.

\* [ 81 ]

Case 44.

### \* Cox against St. Albans.

PROHIBITION was prayed for to the city of London, because the defendant had offered a plea to the jurisdiction, and it had been refused.

Prohibition shall not go to an inferior court, although the cause of action arose out of the jurisdiction, unless that matter has been tendered as a plea before imparlance, and refused.

MR. Chief Justice. In transitory actions, if they will plead that ariseth out of the jurisdiction, and swear it before imparlance, and it be refused, a prohibition shall go. There was a plea in which it was adjudged, FIRST, That upon a bare surmise that the matter ariseth out of the jurisdiction, the court will grant a prohibition. SECONDLY, It must be pleaded, and the oath sworn, and it must come in before imparlance. If all this be done, we would grant a prohibition here. It was also agreed in this case, that the party should never be received to assign for that it was out of the jurisdiction; but it must be pleaded.

S. C. 1. Vent. 180. 333.  
S. C. 2. Keb. 853.  
Ante, 63.  
Post, 273.  
2. Inst. 230.  
1. Vent. 88.  
Vaugh. 405.

MR. JUSTICE. So in this court, when there is a plea to the jurisdiction, as that it is within a county palatine, they plead it before imparlance, and swear their plea.

189. 1. Sid. 151. 2. Mod. 272. 9. Mod. 95. 10. Mod. 166. Fitzg. 82. 314.  
1. 484. 1. Per. Wms. 43. 476. 2. Ld. Ray. 885. 1. Salk. 202. 2. Com. Dig.  
1. 15. Cowp. 166. Dougl. 378. 1. Term Rep. 552. 3. Term Rep. 315.

### The King against Serjeant and Hannis.

Case 45.

INDICTMENT FOR PERJURY committed in giving their evidence on the trial of an indictment for barratry. It appeared by the record that the *venire facias* for the trial of the barratry was made returnable *coram, &c. Justitiariis prædictis* on a certain day, viz. the sixth of March.

The *venire facias* for the trial of an issue before justices of oyer and terminer, ought to be made returnable generally at the next assizes; but perjury is well assigned on a record stating a *venire* to be returned, unless it be reversed.

MR. JUSTICE moved in arrest of the judgment on the indictment for perjury:—FIRST, That the *venire* should not have been returnable on a certain day, but generally *ad proximas assisas*, because it is uncertain when the assizes will begin.—SECONDLY, That being made returnable *coram Justitiariis prædictis*, none but the same Justices should proceed.

S. C. 1. Vent. 181.  
S. C. 2. Keb. 505. 718. 854.  
Dyer, 262.  
Cro. Jac. 314.  
Cro. Car. 254.  
2. Danv. 151.  
2. Mod. 59.  
11. Mod. 86.  
1. Stra. 146. 560. 2. Ld. Raym. 854.

MR. JUSTICE. There was a *venire facias* returnable *nobis apud Westm.* whereas it should have been *ubicunque nascetur, &c.* yet because the court was held here, it was held to be good.

MR. Chief Justice. I remember it. When in an inferior court the *venire facias* is *ad proximam curiam*, it is naught, because uncertain when the court will be kept. But if it be at such a place *proximam curiam* it is good (a).

18

(a) See Cowp. 18.

THE

## Hilary Term, 23. & 24. Car. 2. In B. R.

THE KING  
against  
SERJEANT  
AND HANNIS.

THE COURT held, that the first exception made the record erroneous, but that as it was unreversed, the perjury was well assigned; and that the second was aided by the 1. & 2. *Edw. 6. c. 7.*

### Cafe 46.

### Hall against Clarke.

The acts of a court must be in the *present tense*, but those of the party may be in the *preterperfect*.

A WRIT OF ERROR of a judgment in *Whitechapel*. After the record was read, HALE, *Chief Justice*, said, the acts of a court ought to be in the present tense; as "*præceptum est*," not "*præceptum fuit*:" but the acts of the party may be in the preterperfect tense; as *venit et protulit hic in curiâ quandam querelam suam*; and the continuances are in the preterperfect tense; as "*venerunt*," not "*veniunt*."—But upon another exception THE COURT gave time to move it again.

1. Keb. 346.

561.

2. Saund. 393.

1. Stra. 608. Ld. Ray. 1347. Cowp. 29.

\* [ 82 ]

### Cafe 47.

### \* The King against Stanlake.

On proof made of corrupt practice in a coroner on an inquisition *super visum corporis*, the Court will quash the writ, and grant a *melius inquirendum*.

SIR EDWARD THURLAND moved for a *melius inquirendum* to be granted to the coroner of *Kent*, who had returned an inquisition concerning the death of one who was killed within the manor of *Greenwich*: he had returned, that he died of a *meagrim* in his head, when he was really killed with a coach.

HALE, *Chief Justice*. A *melius inquirendum* is generally upon an office *post mortem*, and is directed to the sheriff.

3. C. 1. Vent. 181.

5. C. 1. Keb. 859.

22. *Edw. 4.*

pl.

4. Co. 57.

Cro. Eliz. 371.

Carth. 72.

3. Mod. 80. 238.

2. Hale, 59.

1. Hawk. P. C.

104.

Salk. 100.

2. Hawk. P. C.

58.

1. Hale, 415.

2. Hale, 59. 69.

Strange, 69.

TWISDEN, *Justice*. But this cannot be to the sheriff; for the coroner must enquire only *super visum corporis* (a). And if you will have a new enquiry, you must quash this. Indeed a new enquiry was granted in *Miles Bartly's Case* (b).

THURLAND prayed, That THE COURT, being the supreme coroner, would examine the misdemeanour of the coroner (c).

HALE, *Chief Justice*. Make some oath of his misdemeanour, because he is a sworn officer. Without oath we will not quash this inquisition (d).

NEWDIGATE said, That in the case of *Miles Bartly* the enquiry was not filed; and that that was the reason why a new one was granted.

HALE, *Chief Justice*. Let the coroner attend; he must take the evidence in writing; and he should bring his examination into court (e).

(a) See the statute 4. *Edw. 1. De Officio Coronatoris*, and the 25. *Geo. 2. c. 29.* 2. Hawk. P. C. 74. 35.

(b) 2. Sid. 90. 101. 144.

(c) 1. Hale, 52. 4. Co. 57. 1. Bl. Comm. 343.

(d) *Strange*, 22. 167. 533. Salk. 377. 2. Hawk. P. C. 78.; and the statute 3. *Hen. 7. c. 1.* 2. *Hen. 8. c. 7.* and 25. *Geo. 2. c. 29.*

(e) See the statute 1. & 2. *Phil. & Mary*, c. 13.

Daniel Appleford's Case.

Case 48.

**A** WRIT OF MANDAMUS was directed to the master and fellows of *New College* in *Oxford*, to restore one *Daniel Appleford*, a fellow. They return, That the *Bishop of Winchester* did erect the college; and among other laws by which the college was to be governed, they return this to be one, *viz.* "That if a scholar, or other member of the said college, shall commit any crime where-  
"by scandal may arise to the college; and it appear by his own  
"confession, or full evidence of the fact, that then he shall be re-  
"moved without any remedy:" and that *Daniel Appleford*, a fellow, was guilty of enormous crimes, and was convicted, and thereupon removed: and they pray judgment, whether this Court will proceed.

A writ of mandamus will not lie to restore a fellow of *New College* in *Oxford*, who has been removed by the Visitor appointed by the Founder of the College.

S. C. 2. Keb. 799. 861.  
2. Lev. 14.  
1. Lev. 23. 65.  
Raym. 56. 94.  
101.  
1. Sid. 29. 94.  
71. 152. 346.  
\* [ 83 ]  
1. Show. 74.  
Carth. 168.  
2. Jones, 175.  
8. Mod. 27.  
148.  
10. Mod. 50.  
12. Mod. 2.  
113. 190. 609.  
666.  
Fitzg. 123. 194.  
1. Ld. Ray. 7.  
2. Ld. Ray.  
1334. 1348.  
1. Stra. 557.  
1. Peer. Wms.  
47. 348. 351.  
1. Burr. 195.  
2. Burr. 1044.  
1. Will. 129. 206.  
Cowp. 377.  
1. Term Rep.  
290. to 346.  
2. Term Rep.  
354.  
3. Term Rep.  
575.  
4. Term Rep.  
233.

**JONES.** By this conclusion they rely chiefly upon the jurisdiction of the Court. I will lay this for a ground, that this Court hath jurisdiction in extrajudicial causes as well as judicial, *11. Co. Bagg's Case*, and \* *Appleford* hath no remedy but this: I will not say that he may not have an action upon the case, but by that he will not recover the thing, but damages. As for an assise, if a man be a corporation sole or head of a corporation aggregate, and be turned out wrongfully, he may have an assise; but for a man that is but an inferior member of a corporation, no assise lieth for him, because he is but a part of the body politic, and doth not stand by himself but must join with others; and as he cannot have an assise, so he cannot have an appeal: *Dyer*, 209. and *11. Rep. Bagg's Case*. 24. *Hen. 8. pl. 22.* 25. *Hen. 8. c. 19.* 4. *Inst.* 340. By these authorities it appears that we are without remedy by way of appeal (a). It may be objected, that there can be no appeal hither, because it is a spiritual corporation. Now I say, this is not a spiritual corporation, as appears by the foundation; and I am of opinion, that if a corporation be all of spiritual persons, yet unless there be a spiritual end, it is no spiritual corporation but a lay one: but if it be a spiritual corporation, yet deprivation is a temporal act; *Dyer* 209. Another objection may be, that the founder hath provided that there shall be no appeal. I answer, the founder cannot by his foundation exclude legal remedies against wrong: a custom, which is the strongest foundation, doth not bind a man up from his legal remedy; *Lit. Sect.* 212. If a man should dispose of his estate by will, and provide therein, that if any difference should arise concerning the execution of the same, that it shall be determined by such and such, and no suit commenced upon it at the common law, this would be a vain appointment; he must not erect a jurisdiction of his own to oust the king's courts of theirs (b).

(a) But see, as to this point of *Bagg's Case*, the argument of *HOLT*, own original manuscript. See also *Chief Justice*, in the case of *Philip v. Rury*, 1. Ld. Ray. 5. as reported 2. Term Rep. 355. from his lordship's own original manuscript. See also 1. Ld. Ray. 9. 1. Term Rep. 396.

(b) See *Kill v. Hollister*, 1. Will. 129.

COLEMAN,

# Hilary Term, 23. & 24. Car. 2. In B. R.

DANIEL  
APPLEFORD'S  
CASE.

1. Sid. 29.

• [ 84 ]

2. Roll. 234.

COLEMAN, *contra*. I conceive this is such a college as no *mandamus* should go to it in any case whatsoever; for it is but a private society, and hath no influence upon the public. In *Rily's Records* we find that *mandamus's* were only letters to colleges, &c. and there were no judicial *mandamus's* till *Bagg's Case*; and I never knew them go but when the party had not only a freehold, but one that was of public concern: now a fellowship of a college is for a private design only to study; and if you grant a *mandamus* in this case, whither will it go at last? Then the foundation was to a spiritual intent; and what is committed to the ecclesiastical power and jurisdiction this Court doth preserve. Ecclesiastical men hold in *eleemosynam*: *Litt. Sect.* 136. \* *Lindewode de Religiosis Domibus*. When colleges are founded under rule and order, it doth give the bishop jurisdiction; so that this Court will not enquire into this matter, no more than it will enquire into causes of deprivation, and matters relating to the institution of clergymen. It hath been denied, that a fellow of a college can bring an assise: but as a prebend hath two capacities, sole and aggregate; so a fellow is a member of a corporation aggregate, and hath a sole capacity in respect of his fellowship: for a churchwarden who is admitted according to the course of the ecclesiastical law, a *mandamus* will not lie. *Vide 6. Hen. 7. pl. 10.*

TWISDEN, *Justice*, In one *Patrick's Case* (a) we all held, that a college was a temporal corporation.

HALE, *Chief Justice*. There is a reason given in *Dyer* why a *mandamus* will not lie in the case there, *viz.* Because it was prayed to be awarded to a temporal corporation.

COLEMAN. It doth appear by the return, that the founder hath appointed a *visitor*: now to him there may be an appeal, and we have returned the sentence of the visitor, and need not return the cause of the sentence: and for books I oppose *Huntly's Case* (b) to *Specott's Case* (c) and *Ken's Case* (d). In our case the party has a remedy elsewhere, and therefore he shall not come hither. If a *mandamus* shall lie for a mastership, fellowship, or scholarship, it will in time come to lie for turning out of commons; and what a combustion will this raise then? The niceties of husband and wife were said by the Judges in *Scott's Case* (e) to be proper for the spiritual court, and not fit to be brought before the Judges.

1. Ld. Ray. 8.  
1. Will. 206.  
1. Burr. 200.  
Cowp. 322.

HALE, *Chief Justice*. That a *mandamus* lies, I will not positively deny; but whether is it fit for us to proceed after this return? It must be taken for granted, that it is not a spiritual cor-

(a) Raym. 101. 1. Lev. 65. 1. Sid. 346. 1. Keb. 287. 294. 298. 551. 610. 665. 835. 2. Keb. 65. 164. 259. (b) 2. Roll. Abr. 209. (c) 2. Roll. Abr. 255. 5. Co. 57. 3. Leon. 198. 1. Ander. 189. Gould. 35. Jenk. 258. (d) 7. Co. 42. Cro. Jac. 186. (e) Manby v. Scott, post. page 124.

poration;

## Hilary Term, 23. & 24. Car. 2. In B. R.

poration; if it were, you ought to appeal to *the visitor*, and then to *the delegates*. It is a private society, as an inn of court (a); and I confess, that *mandamus*'s do generally respect matters of public concern. I never heard of a *mandamus* for a *monk*. If there be a jurisdiction in the visitor, and he hath determined the matter, how will you get over that sentence? The chancellor is visitor of all the king's free chapels, and the 2. Hen. 5. c. doth make him so of all colleges of the king's foundation. Suppose a temporal court over which we have jurisdiction do give judgment in assise to recover an office; so long as that judgment stands in force, do you \* think that we will grant a *mandamus* to restore him against whom the judgment is given?

DANIEL  
APPLAFORD'S  
CASE.

\* [ 85 ]

TWISDEN, *Justice*. In all eleemosynary things there are visitors appointed either by law, or by creation of the party.

HALE, *Chief Justice*. 'The free-chapels of *Windsor* and *Wolverhampton* are not of spiritual jurisdiction. At this rate we should examine all deprivations, suspensions, elections, &c. and by the 13. Eliz. c. 29. the laws of the University are confirmed. We ought not to grant a *mandamus* where there is a *visitor*: but in this case the visitor hath given sentence.

(a) See *Rex v. Gray's Inn*, Dougl. 353.

### Mors against Sluce.

Case 49.

*Michaelmas Term, 23. Car. 2. Roll. 421.*

**A TRIAL AT BAR.** An action upon the case was brought against a master of a ship, who had taken in goods to transport them beyond sea. For that he so negligently kept them, that they were stolen away whilst the ship lay in the river of *Thames*.

An action on the case lies against the master of a ship to recover the value of goods which he hath received upon freight, on their being stolen by open force and violence from on board the ship while lying in the river *Thames*.

MAYNARD insisted upon it, That the master was not chargeable. Say they, He is chargeable whilst he is here; but when he is gone out of the realm, he is not chargeable, though the goods be taken from him. This distinction, he said, had no foundation in law.

HALE, *Chief Justice*. It will lie upon you that are for the defendants, to shew a difference betwixt a carrier and a master of a ship. And it will lie upon you that are for the plaintiff, to shew why the master of a ship should be charged for a robbery committed within the realm, and not for a piracy committed at sea.

It was urged by MR. HOLT for the plaintiff, that a hoy-man, and ferry-man are bound to answer, and why not the master of a ship?

S. C. 3. Keb. 72. 112. 135.  
S. C. 1. Vent. 190. 238.  
S. C. Ray 220.  
S. C. 2. Lev. 69.

3. C. 2. Keb. 866. 1. Danv. 12. Molloy, 209. 230. 239. 1. Roll. Abr. 2. 1. Sid. 36. 8. Mod. 178. 11. Mod. 135. 12. Mod. 6. 472. 482. 2. Ld. Raym. 918. S. C. cited, and said to be the first case adjudged as to the master of a ship, Cowp. 762.

The

Hilary Term, 23. & 24. Car. 2. In B. R.

Moss  
against  
Sluck.

The defendant proved, that there was no carelessness nor negligent default in him.

MAYNARD. He is not chargeable, if there be no negligence in him, because he is but a servant; the owner takes the freight.

HALE, *Chief Justice*. He is *exercitor navis*. If we should loose the master, the merchant would not be secure. And if we should be too quick upon him, it might discourage all masters; so that the consequence of this case is great.

But THE JURY gave a verdict for the defendant; THE COURT, for the reasons aforesaid, inclining that way (a).

(a) It appears that a *special verdict* was found in this case, the material facts of which were, "that the ship lay within the body of a county; that a sufficient number of men were kept on board to attend her; and that the master was to have wages from the owners, and the mariners from the master." It was twice argued; and in Hilary Term, 25. Car. 2. HALE, *Chief Justice*, delivered the unanimous opinion of the Court in favour of the plaintiff: First, Because the ship being *infra corpus comitatus*, the master could not avail himself of the rules of the civil law, by which masters are not chargeable *pro damno fatali*. Secondly, That he is liable,

because he takes a reward in receiving the wages. Thirdly, Because he received the goods generally. Fourthly, Because there is no difference between a *master of a ship* and a *common boy-man*. See the same cases in *marg*. But by the 7. Geo. 2. c. 15. "No owner of any ship shall be liable to make good any loss or damage by reason of any embezzlement by the master or mariners, or any of them, of any goods on ship-board, beyond the value of the ship and freight of the cargo."—See *Sutton v. Mitchel*, 1. Term Rep. 18.; *Froward v. Pitard*, 1. Term Rep. 27.; and the case of *Barclay v. Higgins*, there cited, page 33.

\* [ 86 ]

Cafe 50.

\* Williams, on the Demise of Porter, against Fry.

Michaelmas Term, 22. Car. 2. Roll 392.

If a devise be made to A. for life, with remainder to B. and the heirs of his body, upon condition if B. marry without the consent of C. then the estate shall go to D.; this is a limitation, and not a condition; and if B. marry without the

EJECTMENT. On a special verdict, the case was, A man deviseth to A. for life, the remainder to one and the heirs of his body, upon condition, that if he marry without consent of such and such, or die without heirs of the body of his mother, that then the estate shall go to another and his heirs. The devisee marries without their consent, and he in the remainder enters.

FINCH, *Attorney-General*. The FIRST question will be, Whether this PROVISIO be a condition or a limitation?—SECONDLY, Whether notice be requisite in this case or not?

For THE FIRST, I take it to be a limitation, and that it must so be expounded, and not as a condition, as in the cases of *Wilford v.* If a devise be made to A. for life, with remainder to one and the heirs of his body, upon condition, that if he marry without consent of such and such, or die without heirs of the body of his mother, that then the estate shall go to another and his heirs. The devisee marries without their consent, and he in the remainder enters. —S. C. post. 300. S. C. 1. Freem. 3N. S. C. 1. Vent. 199. S. C. Ray. 236. S. C. 2. Lev. 21. S. C. 2. Keb. 756. 787. 814. 867. S. C. 3. Keb. 19. S. C. 1. Eq. Abr. 111. S. C. 1. Ch. Cases, 138. S. C. 2. Ch. Rep. 26. 2. Show. 316. 2. Danv. 30. 111. Cro. Car. 583. Gouldsb. 153. 1. Leon. 269. 3. Co. 19. Cro. Jac. 510. 2. Bullst. 123. 2. Roll. Rep. 223. 427. Co. Lit. 380. Prec. in Ch. 350. 1. Will. 130. 135. 159. Ambl. 256. 2. Com. Dig. 475. 5. Bac. Abi. 23.

*Wilford;*

Hilary Term, 23. & 24. Car. 2. In B. R.

*Vilford* (a); in *Scholastica's Case* (b); in *Plowden's Queries* (c); in *Englefield's Case* (d); in *Jennour v. Hardy* (e); in *Gibbons v. Vallyard* (f); in *Wiseman v. Baldwin* (g); and the same case in *Owen's Reports* (h), that in case of a devise, a condition must be construed as a limitation. There seems, indeed, to be an authority against me in *Mary Portington's Case* (i), in a reason there given; but it is an accumulative reason, and does not come to the point adjudged. I shall insist upon *Wellock v. Hamond*, as reported in *Leonard* (k), and as it is reported likewise in *Boraston's Case* (l); and LORD COKE says, that it doth resolve a *quære* in *Dyer* 317. so that expresse words of condition may, by construction in a will, amount to no more than a limitation,

WILLIAMS  
against  
FRY.

THE SECOND POINT is, Whether he shall be excused for breach of this condition for want of notice? And I shall consider it in respect of the person; and in respect of the grounds of notice in any case.

FIRST, in respect of the person. Now he may be considered in two capacities, as *an infant*, and as a *devisee*: now his infancy cannot excuse him; for the condition was annexed to the devise expressly; because he was an infant.—SECONDLY, He is a purchaser. Now if an infant purchase an advowson, and the incumbent die, lapse shall incur, though he had notice of the death of the incumbent; and there is the same reason in this case, where he is devisee.—THIRDLY, An infant is bound by all conditions in deed, though not by conditions in law, as appears in the case of *Winbolt v. Tailbury* (m). Indeed 31. *Affize* 17. is against it; but in *Brooke's Abridgment* (n) \*that case is said to be no law, and *Brooke* agreeth with *Plowden* in the case of *Stowel v. Zouch* (o).

\* [ 87 ]

SECONDLY, Consider him as devisee, and then there will be less ground to excuse the want of notice. I take it to be a good difference betwixt lands devised to an heir upon condition, and lands devised to a stranger upon condition. To the heir notice must be given, but not to a stranger: for the heir is in by descent, and a title by law cast upon him: and he may very well be supposed to take no notice of a devise, because the law takes no notice of a devise to him. Now a stranger, as he must needs take notice of the estate given, so he may very well be obliged to take notice of the terms upon which it is given. 4. *Co.* 82. As for the grounds and reasons of the law, when notice in any case is requisite, and when not—FIRST, I take it for a rule, that every man is bound to take notice, when none is bound to give him notice: 1. *Hen.* 7.

2. *Show.* 316.  
1. *Jones*, 380.  
1. *Ro. Rep.* 469.  
*Windh.* 109.  
117.  
*Palm.* 73. 164.  
*Carth.* 92. 170.  
&c.  
2. *Danv.* 111.  
8. *Co.* 92.  
*Cro. Car.* 577.  
2. *Roll. Rep.* 152.  
1. *And.* 86.

(a) *Dyer*, 128. 2.  
(b) *Plowd.* 401.  
(c) *Quære* 108  
(d) *Moor*, 303. 312.  
(e) 1. *Leon.* 283.  
(f) *Poph.* 6.  
(g) 1. *Roll. Abr.* 411.  
(h) *Owen*, 112.

(i) 10. *Co.* 36.  
(k) 1. *Leon.* 259.  
(l) 3. *Co.* 19. 20. *Cro. Eliz.* 204.  
(m) *Plowd.* 57.  
(n) *Tit.* "Condition," pl. 114.  
(o) *Plowd.* 375.

## Hilary Term, 23. & 24. Car. 2. In B. R.

**WILLIAMS** *against* **FAY.** *pl.* 5. 13. *Hen.* 7. *pl.* 9. *Sir Henry Constable's Case* (a); *Burleigh's Case* (b), in the exchequer; and 1. *Cro.* 390. *Roll.* 856. *Litt. Sect.* 350.—SECONDLY, That where persons are equally privy and concerned, there needs no notice, as in *Leviston's Case* (c); *Mallorie's Case* (d); and 14. *Hen.* 7. *pl.* 21.—The THIRD consideration ariseth from the circumstances, and strict formality of all notice. You must not give notice of a will by word of mouth, but you must leave a copy of it compared: *Fraunce's Case* (e). Now the infant in remainder is incapable of observing these circumstances: and they being both strangers, are both to take notice at their peril.

8. Co. 90.  
1. Roll. Rep.  
340.  
2. Brownl. 277.  
3. Buist. 327.  
Cart. 172.

Now to answer objections. One is, that the condition is penal, and inflicts a forfeiture of an estate, and that therefore notice ought to be given. I say, this is rather a declamation, than an argument in law. I will put a case, where he that is subject to a penalty, must give notice to preserve himself, *Poph.* 10. so that penalty or no penalty, is not the business; but privy or no privy guides the case. And *Fraunce's Case* was ruled upon the privy, not upon the penalty. The case of *Curtis v. Woolverston* (f), and a case adjudged in this court, *Lee v. Chamberlyne*, seem against me; but they differ from ours; and the case of *Alford v. the \* Commonalty of London* (g), is an authority for me.

\* [ 88 ]  
Cro. Car. 577.  
2. Danv. 8, 9.  
10. \* 10. Co. 36, 37, &c.

**MR. SOLICITOR NORTH, for the defendant.** I will not speak much to that point, whether it be a condition, or a limitation: I shall rely for that upon *Mary Portington's Case*, that express words of condition cannot be construed to be a limitation. *Dyer* 127. Now, if this be a condition, then the heir regularly ought to enter; which he cannot do in this case, because a remainder is here limited over. The law does interpret conditions according to the nature and circumstances of the thing, and not strictly always according to the letter. I do not observe, that in any case the law suffers a man to incur a forfeiture, where he hath not notice, or is not in law supposed to have notice; and he cited the case of *Molyneux v. Molyneux* (h), and *Fraunce's Case* (i). He said it was not the intention of the party, that the devisee should be stripped of his estate, and be never the wiser. The case of *Saunders v. Gerard* (k) is for me, of which I have a private report. He urged also the case of *Curtis v. Woolverston* (l); and *Pennant's Case* (m).

8. Co. 90, 91.  
1. Roll. 340.  
3. Buist. 327.  
Vide Cart. 172.

3. Co. 64, 65.  
2. And. 90.  
Cro. Eliz. 553.  
572. Moor, 426. 456.

It is objected, that they that are to have the benefit of the estate ought to take notice.—I answer, The same objection might be

(a) 5. Co. 106.  
(b) 3. Leon.  
(c) 1. Leon. 31.  
(d) 7. Co. 117.  
(e) 8. Co. 92.  
(f) Cro. Jac. 57.  
(g) Cro. Car. 577. 1. Jones, 452.

(b) Cro. Jac. 144.  
(i) S. Co. 90.  
(k) (l) *Dyer*, 354. Cro. Jac. 56.  
(m) 3. Co. 64. Moor, 456. Cro. Eliz. 553. 572.

## Hilary Term, 23. & 24. Car. 2. In B. R.

in *Fraunce's Case*. Another reason given to excuse the not-  
ing of notice is, That the condition imports no more than  
re teacheth: But I answer, in case the executor consent, it is  
matter whether the grandmother consent or not. And for  
authorities, I shall rely upon the case of *Gimblet v. Sands* (a);  
upon *Fraunce's Case* for answering them. So he prayed  
ment for the defendant.

WILLIAMS  
against  
FAY.

ALE, *Chief Justice*. All the difference betwixt this case and  
*unce's Case* is, that in that case there is an heir at law, and not  
is. Now the chancery is so just, as to observe the civil and  
n law as to personal legacies, but not as to land (b).

8. Co. 90.  
1. Rol. 340.  
2. Brownl. 277.  
3. Bullt. 327.  
Carth. 172.  
Post. 300, 301,  
&c.

Cro. Car. 392.  
The whole Court were of opi-  
on the first point, that it was a  
view, and not a condition; and on the  
point, that notice was not necessa-  
Judgment therefore was given for

the plaintiff. S. C. Ray. 237. 1. Freem.  
32. 2. Lev. 22. 1. Vent. 205. and  
3. Keb. 23. The defendants brought a  
bill in equity for relief, which was dis-  
missed. Post. 300. 1. Chan. Cases, 138.  
2. Ch. Rep. 26. 1. Eq. Abr. 111.

\* [ 89 ]  
Case 51.

### \* Buckler against Moor.

N ACTION UPON THE CASE was brought upon a promise to  
pay money three months after upon a bill of exchange; to  
the defendant pleads, *non assumpsit infra sex annos*.

was urged, that as this promise was laid he ought to have  
led, that the cause of action did not accrue within six years.

IMPSON. *Non assumpsit infra sex annos* relates to the time of  
ment as well as to the promise.

ALE, *Chief Justice*. That cannot be.

WISDEN, *Justice*. If I promise to do a thing upon request,  
the promise were made seven years ago, and the request  
rday, I cannot plead the statute; but if the request were six  
ago, it must be pleaded specially, viz. that *causa actionis*  
above six years since.

81. 170. 289. 2. Ld. Ray. 838. 3. Atk. 71. Burr. 1284. Gilb. Evid. 477.

To an action  
upon an execu-  
ry promise the  
defendant can-  
not plead  
*non assumpsit*  
*infra sex annos*,  
S. C. 2. Keb.  
874-  
S. C. 1. Freem.  
22.  
Ante, 71. 89.  
8. Mod. 109.  
9. Mod. 32.  
10. Mod. 104:  
205. 294-  
1. Vent. 191.  
Salk. 422.

### Bradcat against Tower.

Case 52.

N ACTION was brought upon a charter-party; and HALE,  
*Chief Justice*, in that case said, that upon a *penalty* you need  
make a demand, as in case of a *nomine pœnæ*: as if I bind my-  
to pay twenty pounds on such a day, and in default thereof to  
forty pounds, the forty pounds must be paid without any de-  
fault.

Demand of per-  
formance is not  
necessary on a  
covenant to pay  
a penalty on de-  
fault.

Cro. Eliz. 383. 2. Danv. 100. pl. 4. 10. Mod. 38. 396. 12. Mod. 413. Dougl. 483.

7. Co. 28.  
1. Saund. 33.

## Hilary Term, 23. & 24. Car. 2. In B. R.

### Cafe 53. Emmerfon, Executor of Fifher, *against* Annifon.

*Trinity Term, 23. Car. 2. Roll 1389.*

Trefpafs.

1. Hale P. C.

510.

3. Infl. 109.

8. C. 2. Keb.

274. S. C. 1. Vent. 187. 2. Stra. 1133. See 2. Bac. Abr. 470. 1. Hawk. P. C. 142. and

4. Black. Com. 233. for an explanation of the principles upon which this diftinction is founded.

(a) By 27. Eliz. c. 7. to cut or take away corn growing is a mifdemearor.

**H**ALE, *Chief Juftice*. If a man cut and carry away corn at the fame time, it is *trespafs* only and not *felony*, becaufe it is but one act; but if he cut it and lay it by, and carry it away afterwards, it is *felony* (a).

### Cafe 54.

### Marthal *against* Ditchin.

*Hilary Term, 22. & 23. Car. 2. Roll 732.*

In trefpafs, if the place where is not named, the defendant may ftate another time, and put the plaintiff to a new assignment.—S. C. 2. Keb. 860. Hob. 16. 1. Cro. 228. 1. Term Rep. 479. 2. Term Rep. 177. 3. Term Rep. 292. 4. Term Rep. 157.

**H**ALE, *Chief Juftice*. If a declaration be general, *quare claufum fregit*, and doth not exprefs what clofe, there the defendant may mention the trefpafs at another day, and put the plaintiff to a new assignment; but if he fay, *quare claufum vocat*. DALE *fregit*, &c. there the conclusion, *quæ eft eadem transgreffio*, will not help.

\* [ 90 ]

### Cafe 55.

### \* Fitzgerald *against* Marthall.

An ejectment for corn mills, without faying what kinds; and 100 acres of heath and furze, without faying how many of each; is good after verdict.

8. C. 1. Vent.

206.

S. C. 3. Keb.

44.

Hard. 59.

Cro. Car. 179.

471. 573. 1. Jones, 454. 2. Danv. 755. 1. Lev. 58. 114. 213. 3. Lev. 96. 11. Co. 55.

4. Co. 87. 8. Mod. 277. 1. Stra. 54. 71. 695. 2. Stra. 834. 1063. 1084. 2. Ld. Ray. 789.

1. Burr. 623. Run. Eject. 33. 1. Term Rep. 11.

**E**RROR of a judgment in the king's bench in *Ireland* (a): the general error assigned. Offered FIRST, That the ejectment was brought *de quatuor molendinis*, without expreffing whether they were *wind-mills* or *water-mills*.

**H**ALE, *Chief Juftice*. That is well enough. The precedents in THE REGISTER are fo.

**S**ECONDLY, That it was of fo many acres *jampnor. et brueria*, not expreffing how many of each.—**P**ER CURIAM. That hath always been held good.

It was then objected, That the record was not removed.—**U**p- on which it was ordered to ftay.

(a) See 22. Geo. 3. c. 28. and from Ireland to the courts in England 23. Geo. 3. c. 53. by which appeals are abolifhed.

Hilary Term, 23. & 24. Car. 2. In B. R.

Allane *against* Exton.

Case 56.

**P**EMBERTON moved for a prohibition to the spiritual court, For that they cited the minister of *Marybone*, which is a *donative*, to take a faculty of preaching from the bishop.

The spiritual court may cite the minister of a *donative* to take a faculty for preaching from the bishop.

**HALE, Chief Justice.** If the bishop go about to visit a *donative*, this Court will grant a prohibition; but if all the pretence be, that it is a chapel and the chaplain hired, and the bishop send to him that he must not preach without licence, it may be otherwise.

S. C. 2. Keb. 876.

**TWISDEN, Justice.** FITZHERBERT saith, If a chaplain of the king's free chapel keep a concubine, the bishop shall not visit, but the king.

Ante, 11. 22. Fitzg. 165. 189. 272.

**HALE, Chief Justice.** Indeed, whether there be all ornaments requisite for a church, the bishop shall not enquire, nor shall he punish for not repairing. Originally free chapels were colleges, and some did belong to the king, and some to private men: and in such a chapel, he that was in was entitled as *incumbent*, and not a *stipendiary*.—Ordered to hear counsel (a).

2. Ld. Ray. 1205. 1507. 2. Stra. 715. 1. Peer. Wms. 47. 301. 657. 774. 3. Peer. Wms. 337.

(a) It is said, S. C. 2. Keb. 876. that the prohibition was denied, because it appeared to be not a *free chapel*, but a *private chapel*, and the minister a *stipendiary curate* set up by the impropriator. See Dogge Parl. c. 12. Lindw. 233. Gibson, 212. See also a constitution by archbishop Stratford, 1. Burn's Ec. Law, 273. and the Preface to Tanner's Notit. Monast. page 28. Co. Lit. 344. Yelv. 61. 1. Sid. 432. Ld. Ray. 1205.

3. Willf. 355. and 2d vol. Burn's Ec. Law, title "Donative." And in the case of Powell v. Melburn, 3. Willf. 361. it is said by DE GRAY, Chief Justice, that no such licence for preaching is necessary to be had by the minister of a *donative* with cure of souls, but that it is only necessary in the case of lecturers. See also Campbel v. Aldrich, 2. Willf. 79. Rex v. Bishop of Chester, 1. Term Rep. 404.

Stroud's Case.

Case 57.

**S**TROUD moved for a prohibition to the bishop's court of *Exeter*, Because they proceeded to the probate of a will that contained *devices of lands*, as well as bequests of *personal things*.

An intire will, though of *land* as well as *goods*, may be proved in *prærogative court*.

**HALE, Chief Justice.** Their proving the will signifies nothing as to the land.—STROUD urged *Denton's Case*, and some other authorities.—**HALE, Chief Justice.** The will is entire, and we are not advised to grant a prohibition in such case.

S. C. 2. Keb. 838. 876. 1. Vent. 207. Hard. 1.

Styles Reg. 387. 10. Mod. 21. 63. 272. 386. 439. Gilb. Eq. Rep. 203. 226. Fitzg. 126. 125. 303. 1. Peer. Wms. 388. 527. 549. 3. Peer. Wms. 102. 115. 166. 4. Stra. 777. 847. 865. 4. Com. Dig. "Prohibition" (G. 16.). 2. Term Rep. 473.

Hilary Term, 23. & 24. Car. 2. In B. R.

Cafe 58.

Wilkinson *against* Rocklas.

The goods of an outlaw may be recovered by information in the nature of trover.—Hardres, 22. 10. Mod. 188. 357. 380. 409. 11. Mod. 173. 12. Mod. 175. 438. Fitzg. 265. Comyns, 51. 1. Peer. Wms. 445. 684. 690. 2. Peer. Wms. 269. 1. Ld. Ray. 305. Tidd's Practice, 67, 68.

\* [ 91 ]

Cafe 59.

\* Parsons *against* Perns.

Hilary Term, 22. & 23. Car. 2. Roll 1051.

If one of two women who are joint-tenants in fee make a feoffment to a man, and livery within view, and marry the feoffee before he enters on the land, his entry after the marriage is a good execution of the livery; for being within view an irrevocable interest passed to the feoffee, and the subsequent entry shall relate back so as to make the feoffment perfect.

S. C. Pollexfen, 45. to 53. S.C. 1. Vent 186. S.C. 2. Lev. 34. S.C. 3. Salk. 165. S. C. 2. Keb. 872. 280. Moor, 85. 4. Co. 68. Co. Lit. 52. 351. 1. Vern. 330. 8. Mod. 68. Perk. 212. Sheph. Touch. 216, 217.

**TRESPASS.** Two women were jointenants in fee. One of them made a charter of feoffment, and delivered the deed to the feoffee, and said to him, being within view of the land, "Go, enter, and take possession;" but before any actual entry by the feoffee, the feoffor and feoffee intermarry.

The question was, Whether or no this marriage, coming between the delivery of the deed and the feoffee's entry, had destroyed the operation of the livery within the view?

**POLLEXFEN.** It hath not; for the power and authority that the feoffee hath to enter, is coupled with an interest, and not countermandable in fact, and if so, not in law. If I grant one of my horses in my stable, nothing passeth till election, and yet the grant is not revocable: so till attornment nothing passeth, and yet the deed is not revocable. If the woman in our case had married a stranger, that would not have been a revocation: *Perk. 29.* I shall compare it to the case of *Burgaine v. Spurling, Cro. Car. 273. 284(a).* Now for the interest gotten by the husband by the marriage; he hath no estate in his own right. If a man be seised in the right of his wife, and the wife be attainted of felony, the lord shall enter and oust the husband; he gains nothing but a bare perception of profits till issue had: After issue had, he has an estate for life. Where a man that hath title to enter, comes into possession, the law doth execute the estate to him: *7. Hen. 7. pl. 4. 2. Roll. Abr. tit. "Attornment."* 38. *Edw. 3. pl. 11. Brook tit. "Feoffment,"* 57. *Moor, 85. 3. Cro. 370.*

**HALE, Chief Justice,** said to the counsel on the other side, You will never get over the case of *38. Edw. 3. pl. 11.* My LORD COKE to that case saith, that the marriage without attornment, is an execution of the grant: but that I do not believe; for the attendance of the tenant shall not be altered without his consent. The effectual part of the feoffment is, "Go, enter, and take possession."

(\*) S. C. Jones, 569.

TWISDEN,

Hilary Term, 23. & 24. Car. 2. In B. R.

TWISDEN, *Justice*. Suppose there be two women seised, one of one acre, and another of another acre, and they make an exchange, and then one of them marries before entry, shall that defeat the exchange?

HALE, *Chief Justice*. That is the same case.—So judgment was given accordingly, by THE WHOLE COURT, for the plaintiff.

PARSONS  
against  
PARNS.

\* [ 92 ]  
Case 60.

\* Zouch *against* Clare.

THOMAS tenant for life; the remainder to his first, second, and third son; the remainder to *William* for life; and then to his first, second, and third son; and the like remainders to *Paul*, *Francis*, and *Edward*, with remainders to the first, second, and third son of every one of them. *William*, *Paul*, *Francis*, and *Edward*, levy a fine to *Thomas*; *Paul* having issue two sons at the time. Then *Thomas* made a feoffment.

A present right of entry will support a freehold contingent remainder.  
1. Vent. 188.  
2. Keb. 872.  
881.  
2. Lev. 35.  
Gilb. Eq. Rep. 34.  
10. Mod. 362.  
11. Mod. 121.  
12. Mod. 174.  
Comyns, 62.  
1. Ld. Ray. 314. 316.  
2. Peer. Wms. 379. 610. 613.  
3. Peer. Wms. 210.

MR. LEAK urged, that the remainders were hereby destroyed.

HALE, *Chief Justice*. Suppose *A.* be tenant for life, the remainder to *B.* for life, the remainder to *C.* for life, the remainder to a contingent, and *A.* and *B.* do join in a fine, doth not *C.*'s right of entry preserve the contingent estates? If there had been in this case no son born, the contingent remainders had been destroyed; but there being a son born, it left in him a right of entry, which supports the remainders: and if we should question that, we should question all; for that is the very basis of all conveyances at this day.—And judgment was given accordingly.

Cases Temp. Talb. 238. The same point adjudged in the case of *Parkhurst v. Smith*, Lessee of *Dormer*, in the House of Lords, on the 23d February, 1741, reported 4. Brown's Cases Parl. 405. 3. Atk. 135. 2. Stra. 1105. 18. Viner's Abr. 413. Fearn. Cont. Rem. 212.; and see Mr. Hargrave's note (2), Co. Lit. 205. a.

# E A S T E R T E R M,

The Twenty-Fourth of Charles the Second,

I N

The King's Bench.

Wednesday, April 24, 1672. 3

*Sir Matthew Hale, Knt. Chief Justice.*

*Sir Thomas Twisden, Knt.*

*Sir William Moreton, Knt.*

*Sir Richard Rainsford, Knt.*

} *Justices.*

*Sir Heneage Finch, Knt. Attorney General,*

*Sir Francis North, Knt. Solicitor General,*

\*[ 93 ]

Cafe 1.

If, after judgment affirmed on error, the plaintiff become bankrupt, and the judgment assigned, and then the plaintiff levies execution, THE COURT will detain the money, that *she assignee* may recover it by proving their title in a *scire facias*.

Monke against Morris and Clayton.

**A**N ACTION was brought by *Monke* against the defendants, and judgment was given for him. The defendants brought a writ of error, and the judgment was affirmed.

JONES moved, that the money might be brought into court, the plaintiff having become a bankrupt.

WINNINGTON. This case was adjudged in the common pleas, viz. A man brought an action of debt upon a bond and had a verdict, and before the *day in bank* became a bankrupt: it was moved, that that debt was assigned over, and prayed to have the money brought into court; but the Court refused it.

COLEMAN. We have the very words for us in effect; for now it is all one as if judgment had been given for the assignees of the commissioners.

S. C. 3. Keb. 1. 14. 68. S. C. 1. Vent. 193. Post. 215. Cro. Car 166. 176. 1. Lev. 13. 9. Lev. 58. 70. 191. 2. Sid. 115. 9. Jones, 196. 1. Ventr. 137. 360. 1. Vern. 94. Gilb. Eq. Rep. 35. 103. 140. 221. 10. Mod. 144. 432.

TWISDEN,

## Easter Term, 24. Car. 2. In B. R.

**TWISDEN, Justice.** How can we take notice that he is a bankrupt? Any execution may be stopped at that rate by alledging that there is a commission of bankrupt out against the plaintiff: if he be a bankrupt, you must take out a special *scire facias* and try the matter, whether he be a bankrupt or not. Which JONES said they would do; and THE COURT granted.

MONKE  
against  
MORRIS AND  
CLAYTON.

### Anonymous.

Case 2.

**TWISDEN, Justice.** If a *mariner* or *ship carpenter* run away, S. C. 1. Vent. he loses his wages due: which HALE, *Chief Justice*, granted. 146.

398. 576. 632. 639. 650. 739. 1. Stra. 707. Comyns, 137. 2. Ld. Ray. 933. 1044. 1206. 1211. 1247. 1433. 8. Mod. 379. 10. Mod. 78. 264. 11. Mod. 5. 31. 43. 12. Mod. 246. 405. 440. 511. 526. Gilb. Eq. Rep. 226. Fitzg. 197.—See also 22. & 23. Car. 2. c. 11. f. 7. Dougl. 539. 1. Term Rep. 79.

\* [ 94 ]

\* Henry Lord Peterborough *against* John Lord Mordaunt. Case 3.

**A TRIAL AT BAR** upon an issue out of the chancery, Whether *Henry Lord Peterborough* had only an estate for life or was seised in fee-tail? *Lord Peterborough's* counsel alledged, that there was a settlement made by his father in the ninth year of *Charles the First* whereby he had an estate in tail, which he never understood till within these three years: but he had claimed hitherto under a settlement made in the sixteenth year of *Charles the First*. To prove a settlement made in the ninth year of *Charles the First* he produced a witness who said, that he being to purchase an estate from my Lord the father, one *Mr. Nicholls*, who was then of counsel to my Lord, gave him a copy of such a deed to shew what title my Lord had: but being asked, Whether he did see the very deed, and compare it with that copy? he answered in the negative.—Whereupon THE COURT would not allow his testimony to be a sufficient evidence of the deed; and so the verdict was for my Lord *Mordaunt*.

The copy of a deed cannot be given in evidence, unless proved to have been compared with the original, although delivered by counsel to a purchaser as a true copy.

S. C. post. 114. S. C. 3. Keb. 1. 305. Ante, 4. 1. Lev. 25. 5. Mod. 211. 386. 6. Mod. 225.

248. 10. Mod. 42. 74. 108. 126. 292. 518. 1. Ld. Ray. 735. 3. Peer. Wms. 396. 2. Vern. 471. 591. 603. Prec. in Chan. 116. Gilbert's Law Evid. 4th edit. 96. 1. Atk. 49. 3. Atk. 214. Dougl. 594. Buller's N. P. 228. 254. 3. Term Rep. 151.

### Cole *against* Forth.

Case 4.

**A TRIAL AT BAR** directed out of chancery upon this issue, Whether “waste or no waste?” HALE, *Chief Justice*. By protestation I try this cause, remembering the statute of 4. Hen. 4. c. 23.: and the statute being read, whereby it is enacted, “That after judgment given in the court of our lord the king, the parties and their heirs shall be thereof in peace until the judgment be undone by writ of error or attain,” he said this cause had been tried in *London*, and, in a writ of error in parliament, the judgment affirmed: now they go into chancery, and we must try the cause over again, and the same point.

Account of equity may direct an issue, although a judgment has been given in the cause at common law.

Ante, 59. 3. Black. Com. 53. 1. Ch. Rep. App. 26.

H 4

A lease Moor, 828.

Easter Term, 24. Car. 2. In B. R.

If a lessee pull down a brew-house, and build dwelling-houses on its site, it is waste.

S. C. 1. Lev. 309.

\* [ 95 ]

S. C. 2. Saund. 252.

3. Keb. 8.

Co. Lt. 53.

2. Roll. Abr.

815. 818.

4. Co. 63.

Moor, 277. Hob. 234. Kellw. 39. Cro. Jac. 182. Owen, 93. 1. Salk. 368. 1. Term Rep. 56.

It is waste to pull down and rebuild a house, although it be too bad to be repaired.

Co. Lit. 53. 2.

1. Roll. Abr.

307.

2. Roll. 682.

815.

3. Co. 119.

2. Sid. 229. 2. Saund. 252. 1. Peer. Wms. 406. 527. 2. Peer. Wms. 240. 397. (606).

3. Peer. Wms. 267. Gilbert's Evidence, 4th edit. 270.

A lease was made by *Hilliard* to *Green* in the year 1651; afterwards he deviseth the reversion to *Cole*; and *Forth* gets an under-lease from *Green* of the premises, being a brew-house: *Forth* pulls it down, and builds the ground into tenements.

HALE, *Chief Justice*. The question is, Whether this be waste or no? And if it be waste at law, it is so in equity. To pull down a house is waste, \* but if the tenant build it up again before an action brought, he may plead that specially.

TWISDEN, *Justice*. I think the books are *pro* and *con*, whether the building of a new house be waste or not.

HALE, *Chief Justice*. If you pull down a malt-mill, and build a corn-mill, that is waste.

Then the counsel urged, that it could not be repaired without pulling it down.

TWISDEN, *Justice*. That should have been pleaded specially.

HALE, *Chief Justice*. I hope the chancery will not repeal an act of parliament. Waste in the house is waste in the curtilage; and waste in the hall, is waste in the whole house.

So the Jury gave a verdict for the plaintiff, and gave him one hundred and twenty pounds damages.

MICHAELMAS

# MICHAELMAS TERM,

The Twenty-Fifth of Charles the Second,

I N

The King's Bench.

Thursday, October 30, 1673.

Sir Matthew Hale, *Knt. Chief Justice.*

Sir Thomas Twisden, *Knt.*

Sir Richard Rainsford, *Knt.*

Sir William Wylde, *Knt.*

} *Justices.*

Sir Heneage Finch, *Knt. Attorney General.*

Sir Francis North, *Knt. Solicitor General.*

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\* Brightman *against* Parker.

*Easter Term, 25. Car. 2. Roll 36.*

\* [ 96 ]

Case 1.

**A**N ACTION OF DEBT was brought upon a bond in an inferior court; the defendant *cognovit actionem, et petit quod inquiratur per patriam de debito*. This pleading came in question in the king's bench upon a writ of error; but was maintained by the custom of the place, where, &c.—HALE, *Chief Justice*, said, It was a good custom; for perhaps the defendant has paid all the debt but ten pounds, and this course prevents a suit in chancery. And it were well if it were established by act of parliament as the common law.—WYLDE. That custom is at *Bristol*.—The judgment was affirmed.

In debt on bond in an inferior court, the defendant may, by custom, pray a writ of enquiry after a *cognovit actionem*.

S. C. 3. Keb.

212.

2. Danv. 443.

Cro. Eliz. 894.

2. And. 251.

Cro. Jac. 357. 1. Roll. Rep. 193. Styles, 124. Moor, 603. 1. Sid. 355. 2. Inst. 204. 2. Burr. 779.

Randall

If a rent be granted out of gavelkind lands to a man and his heirs, it shall descend to all the sons or brothers according to the descent of the land, and not go to the heir at common law; for the rent issues out, and is part of the profits of the land.

\* [ 97 ]

S. C. 3. Keb. 265. 214.  
S. C. 2. Lev. 87.  
S. C. 1. Freem. 105. 345.  
S. C. 2. Danv. 54).  
S. C. 1. Vern. 489.  
S. P. post. 102. 112.  
S. P. Salk. 244.  
2. Ro. Abr. 780.  
Noy, 15.  
Cro. Car. 411.  
Cro. Jac. 498.  
Co. Lit. 148.  
Hardres, 325.  
1. Sid. 135.  
3. Lev. 80.  
Raym. 59. 76.  
8. Mod. 208.  
10. Mod. 417.  
11. Mod. 160.  
2. Id. Ray. 1024. 1292.  
1. Peer. Wms. 64. 475.  
3. Peer. Wms. 63.  
2. Bac. Abr. 640.  
See Robins. on Gavelkind, 84.  
1. Term Rep. 466. 474.

**REPLEVIN.** The defendant made conuſance as bailiff to *William Jenkins*, for a rent-charge granted out of gavelkind lands to a man and his heirs. The question was, Whether this rent should go to the heir at common law, or should be partible amongst all the sons?

**HARDRES.** It shall go to the eldest son, as heir at law: for I conceive it is by reason of a custom, time out of mind used, that lands in *Kent* are partible amongst the males, as appears by *Lambard* in his *Perambulation of Kent* (a). Now, this being a thing newly created, it wants length of time to make it descendible by custom. A feoffment in fee is made of gavelkind lands upon condition; the condition shall go to the heirs at common law, and not according to the descent of the land (b). If a warranty be annexed to such lands, it shall descend only upon the eldest son (c). Now, this rent-charge, being a thing \* contrary to common right, and *de novo* created, is not apportionable (d): It is not a part of the land; for if a man levy a fine of the land, it will not extinguish his rent, unless by agreement betwixt the parties (e): If there be a custom in a particular place concerning dower, it will not extend to a rent-charge (f): There is no occasion in this case to make the rent descendible to all; for the land remains partible amongst the males, according to the custom: and why a rent should go so, to the prejudice of the heir, I know not. In the *Year Book* (g) it is said, that a rent is a different and distinct thing from the land. Then the language of the law speaks for general heirs, who shall not be disinherited by construction. The grand objection is, Whether the rent shall not follow the nature of the land? *Fitzherbert* said, he knew four authorities that it should (h). As for his first case, I say, that rent among parceners is of another nature than this; for that is distrainable of common right. As for the second, I say, the rule of it holds only in cases of proceedings and trials; which is not applicable to this custom. His third case is, that if two coparceners make a feoffment, rendering rent, and one dies, the rent shall not survive. To this I find no answer given. The text of *Littleton* (i) is further objected, where it is said, that if land be devisable by custom, a rent out of such lands may be devised by the same custom; but authorities clash in this point (k). He cited farther these books, *Lambard's Perambulation of Kent*; the *Year Book*, 14. *Hen. 8. pl. 7, 8.* 21. *Hen. 6. pl. 11.*; and the case of *Randall v. Roberts*, *Noy 51.*

(a) Page 543.  
(b) 9. *Hen. 7. pl. 24.*  
(c) 38. *Edw. 3. pl. 22.* 43. *Edw. 3. pl. 19.* *Co. Lit. 376.* *Cro. Jac. 218.* 8. *Co. 8.*  
(d) *Co. Lit. 148. 150.*  
(e) *Brook. Abr. fe. 201. b. pl. 58.*

(f) *Co. Lit. 12.*  
(g) 14. *Hen. 8. pl. 27.* *Hen. 8. pl. 4.*  
(h) *Fitz. Abr. "Avowry," 150.*  
(i) *Co. Lit. 322. a.*  
(k) *Co. Lit. 111. a. Styles, 49.*

## Michaelmas Term, 25. Car. 2. In B. R?

DEN. *contra*. I conceive this rent shall descend to all the brothers; for it is of the quality of the land, and part of the land; it is contained in the bowels of the land, and is of the same nature with it; as it is said by THORPE, *Justice*, in *Zouche's Case*, 22. Aff. 78. which I take to be a direct authority, as well as an instance. In some boroughs a man might have devised his land by custom, and in those places he might have devised a rent out of it: *Co. Litt.* 111. a. The statute *de bonis conditionalibus* brought in a new estate of inheritance by way of intail. Now this estate tail in gavelkind lands hath been taken to descend to all the brothers; and the reason is, because it is part of the fee-simple, though created *de novo*: so uses follow the nature of the land. The cases that have been cited, were \*not the opinion of the Court, but of them that argued. *Mr. Lambard* 47. saith, That the custom extends to advowsons, commons, rent-charges, as well as to land. It is objected, that here must be a prescription: I answer, gavelkind law is the law of *Kent*, and is never pleaded, but presumed. 7. *Edw.* 3. pl. 38. *Co. Litt.* 175. 2. *Edw.* 4. pl. 18. and *Co. Litt.* 140. saith, The customs of *Kent* are of common right; and if so, then our rent-charge will go of common right to all the brothers.

RANDALL  
against  
JENKINS.

\* [ 98 ]

HALE, *Chief Justice*, RAINSFORD and WYLDE, *Justices*, were of opinion, That the rent ought to descend to all the brothers, according to the descent of the land; because the rent is part of the profits of the land, and issues out of the land.—And they gave judgment accordingly.

### Pybus *against* Mitford.

### Case 3.

A MAN covenanted to stand seised to the use of the heirs of his body.

HALE, *Chief Justice*, The heir and the ancestor are cor-relatives, and as one thing in the eye of the law; and that is the reason why a man shall not make his right heir a purchaser, without putting the whole fee-simple out of himself. If the father's estate turn to an estate for life, there will be no question. In the case of *Fenwick v. Mitford* (a), there did result an estate for life, to knit the limitation to the original estate. Here, FIRST, We are in the case of an estate tail; and the Judges use to go far in making such a limitation good: then, SECONDLY, We are in the case of an use, which is construed as favourably as may be, to comply with the intention of the party. This case is not as if he should have covenanted to stand seised to "the use of the heirs of the "body of J. D." There the covenantor would have had a fee-simple in the mean time: but the case is all one as if the limitation had been "to himself, and the heirs of his own body." See the *Earl of Bedford's Case* (b).

TWISDEN, *Justice*. We must make it good if we can.—*Cur. advisare vult*.

Cowp. 234.—(a) Moor, 224. (b) Jenk. 248. 7. Co. 7. 2. Anderson 197.

Austin

If A. covenant to stand seised to the use of the heirs of his body, he shall be adjudged to take an estate for his own life by implication.

S. C. post. 123. 159. S. C. 3. Keb. 239. 316. 338. S. C. 2. Lev. 75. S. C. Ray. 228. S. C. 1. Vent. 372. S. C. 1. Freem. 351, 369. Post. 226. 237. Co. Lit. 22. 1. Co. 13. 2. Salk. 679. 2. Eq. Ab. 753. Fearn's Cont. Rem. 49. Gilb. Dev. 99. Moor. 718.

A father is tenant for life, with remainder to his son in fee, and by the deed of settlement an annuity is given to the son during the life of the father; the son releases "all arrears of rent, annuities, titles, and demands," to the day of the release. *Quære*, Whether this passes the inheritance as well as the annuity?

S. C. 2. Keb. 243.  
S. Co. 154. b.  
Cro. Jac. 486.  
Co. Lit. 291. b.  
10. Mod. 423.  
12. Mod. 401.  
455. 460.  
Gilb. Eq. Rep. 306. 143.  
1. Vern. 32.  
Prec. Ch. 545.  
1. Peer. Wms. 329. 639. 728.  
2. Peer. Wms. 316. 321.  
1. Ld. Ray. 235. 518. 522.  
664.  
2. Ld. Ray. 286. 1306.

**A SPECIAL VERDICT.** *Francis* the father was tenant for life, the remainder in fee to *Francis* the son; and by the deed by which this estate was thus settled, one hundred pounds a-year was appointed to be paid to *Francis* the son during the father's life. The son releaseth to the father "all arrears of rent, annuities, titles, and demands by virtue of that indenture;" and the question was, Whether this release passed *the inheritance* as well as *the annuity*?

**POLLEXFEN.** I conceive this release shall not pass any estate in the land; and my reason is, Because there is no mention of the land nor of any estate therein. The principal thing intended and expressed is the annuity; then the release concludes to the day of the release, which doth manifest that he did not intend to release any thing that was not to come to him till after the death of his father. It is true, here is the word "*demand*," but that will not do it; as in *Seaman v. Oakley*, Cro. Eliz. 268. Then for the word "*titles*;" in *Nichol's Case*, Plowd. 494. and in *Altam's Case*, 8. Co. 153. b. it is where a man hath lawful cause to have that which another doth possess; sometimes it is taken in a larger sense, and then it doth include right. Upon construction of this release I think it ought to be taken in the stricter sense, and the intention of the party must guide the construction; for where there are general words in the beginning and particular words afterwards, the particular do restrain the general: and so *vice versa* for enlargement. He cited *Hen v. Hanson* (a) in this court, where a release of *all demands* would not release a *rent-charge*, by the opinion of three Judges against *TWISDEN* for that reason, and because words in deeds are to be taken according to common acceptance: he cited 2. Roll. 409. In our case, the general words of "all suits and titles" are limited and restrained to the annuity and title of that, and shall not by a large construction be extended to anything else.

**HALE, Chief Justice.** How hath the inheritance gone?

**POLLEXFEN.** The grandchild has that.

**HALE, Chief Justice.** I think a release of "*all demands*" will not extinguish a *rent*; but if it were "*all demands out of land*," it were another thing. It hath been held over and over again, that it does not extinguish and discharge a covenant not broken: but what say you to this release of "*all titles*?" For it appears \* in express terms, that the son did not only release the arrears of the annuity, but the thing itself; and not only so, but all other titles by virtue of that deed. Suppose the case had been but thus: The father is tenant for life, the remainder to the son

Michaelmas Term, 25. Car. 2. In B. R.

for life; the son releaseth to his father all *the title* that he has by virtue of that deed: had not this passed the son's estate for life? In the cases that you have cited it is allowed, that a release of "all titles" will pass a right to land: he had a title to the annuity, and a title to the remainder; now he releaseth the annuity and all other titles which he hath by that deed or otherwise howsoever.— To hear MAYNARD, *Serjeant*, on the other side (a).

AUSTIN  
against  
LIPPINCOTT.

(a) It does not appear that this case was determined. S. C. 3. Keb. 244.

Wilson against Robinson:

Case 5.

Trinity Term, 24. Car. 2. Roll 1415.

A MAN deviseth all his tenant-right estate at *Brickend*, and "all that my father and I took of *Rowland Hobbs*."

A devise of  
"all my tenant-  
right estate at  
"A." passes a  
fee simple.

LEVINZ. I conceive that these words pass only an estate for life; for it is not mentioned what estate he hath. In the case of *Wilkinson v. Merryland* (a), a devise was made of all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, &c. and the Court held, that no fee passed; and said it was a doubt, whether any estate would pass in that case, but what was for years, being coupled only with personal things. In the case of *Ferman v. Johnson* (b), one devised all his estate, paying his debts and legacies; now his personal estate came but to twenty pounds, and his debts were one hundred pounds; there, indeed, all his real estate passed because of the payment of his debts. And in our case the following particulars are but a description of the land, and contain no limitation of the estate. If a man deviseth *Black-acre* to one and the heirs of his body, AND ALSO deviseth *White-acre* to the same person, he hath but an estate for life in *White-acre*, though he hath a fee-simple in the other: for the word "also" is not so strong as if it had been "in the same manner." *Moor* 152. *Yel.* 209.

S. C. 3. Keb.  
180. 245.  
S. C. 2. Lev. 92.  
1. Roll. Abr.  
834.  
Cro. Jac. 290.  
3. Mod. 45.  
8. Mod. 90.  
102.  
10. Mod. 94.  
287. 525. 532.  
12. Mod. 592.  
Fitzg. 18. 70.  
116. 151. 232.  
314.  
Gilb. Eq. Rep.  
30. 77.  
2. Vern. 461.  
560. 564. 625.  
691.  
Prec. Chan. 37.

WESTON, *contra*. I conceive an estate of inheritance (c) doth pass; for the word "estate" comprehendeth all his interest. When a man deviseth "all his estate," he leaves nothing \* in himself. In the case of *Ferman v. Johnson* it was held, that "all my estate" comprehends "all my title and interest" in the land. If a man devise "all his inheritance," this carries the fee-simple of his land: and the word "all his estate" is as comprehensive as that.

\* [ 101 ]  
Abr. Eq. 178.  
Cases Temp.  
Talbot. 110. 157.  
284.  
Comyns, 337.  
1. Ld. Raym.  
287.

HALE, *Chief Justice*, and WYLDE, *Justice*. By a grant or release of "*totum statum suum*," the fee-simple will pass. If the

1. Ld. Raym.  
831. 1325.  
299. 306. 660.  
360. 4. Term  
Rep. 93.

(a) Cro. Car. 447. 449. 1. Roll. Abr. 834. pl. 14.

(b) Trinity Term, 1649. Roll 153. Styles, 211. 293.

(c) Cro. Jac. 290.

words

## Michaelmas Term, 25. Car. 2. In B. R.

**WILSON**  
*against*  
**ROBINSON.**

words had been "all my tenant-right lands," it had been otherwise: but the word "estate" is more than so. If a man deviseth all his copyhold estate, will not all his whole interest pass?—*Adjournatur (a).*

(a) The Court held, that *the fee* of the tenant-right land passed by this devise. S. C. 3. Keb. 180. 245. S. C. 1. Lev. 91. but as the special verdicts had not found how many acres of the tenant-right lands, and how many of the other lands, a *venire facias de hoto* was awarded. S. C. 1. Lev. 91.

Cafe 6.

Norman *against* Foster.

*Trinity Term, 25. Car. 2. Roll 436.*

On a covenant for quiet enjoyment, a breach that a stranger entered claiming title, without shewing the kind of title under which he claimed, is bad.

S. C. 3. Keb. 246.

Ante, 66.

Post, 290.

1. Danv. 50.

3. Leon. 4.

Cro. Jac. 315.

319. 425. 444.

4. Co. 80.

1. Roll. Abr. 430.

Vaugh. 118.

1. Lev. 301.

2. Lev. 37. 194.

3. Lev. 325.

1. Saund. 60.

2. Saund. 177. 181.

2. Mod. 213.

3. Mod. 135.

8. Mod. 318.

10. Mod. 143.

384. 158.

Comyns, 230.

2. Show. 425.

1. Stra. 400.

Dougl. 43.

1. Term Rep. 671.

3. Term Rep. 584.

AN ACTION OF DEBT upon a bond to perform covenants in an indenture of lease; one covenant is for quiet enjoyment: and the plaintiff assigns for breach, That a stranger entered claiming title, but does not say what title he had.

HALE, *Chief Justice.* *Habens titulum* at that time, would have done your business. My Lord Dyer's Case (a) is, That another entered claiming an interest; but that is not enough; for he may claim under the lessee himself. He mentioned the cases in *Moor* 861. and *Hob.* 34. of *Tisdale v. Essex.* If the covenant had been to save him harmless against all lawful and unlawful titles, yet it must appear, that he that entered did not claim under the lessee himself.—HALE. If I covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second.—And so said WYLDE; and that one covenant went to the title, and the other to the possession; an assumption to enjoy *sine interruptione alicujus*, that is, whether by title or by tort, a quiet possession being to be intended to be the chief cause of the contract (b).

(a) Dyer, 328.

(b) It is said, that the Court inclined strongly for the defendant, but that the

matter was adjourned. S. C. 3. Keb. 246.

\* [ 102 ]

Cafe 7.

\* Angell's Cafe.

A pardon of "all offences" includes every crime not capital.

ANGELL convicted of *barratry*, produced a pardon, which was of all "treasons, murders, felonies; and all penalties, forfeitures, and offences."—THE COURT said, the words "all offences" will pardon all offences that are not capital.

2. Show. 334.

2. Mod. 53.

1. Lev. 8.

26. 120.

Fitzg. 107.

306.

8. Mod. 104.

11. Mod. 233.

12. Mod. 119.

1. Ld. Raym. 215.

637.

2. Ld. Ray. 818.

1. Stra. 473.

529.

2. Stra. 912.

1272.

1. Peer. Wms. 696.

Blackburn

Michaelmas Term, 25. Car. 1. In B. R.

Blackburn *against* Graves.

Case 8.

**T**ROVER for one hundred loads of wood. On a special verdict the case was, A copyholder surrenders to the use of several persons for years *successive*, the remainder in fee to J. S.

In copyholds, the admittance of a particular tenant is an admittance of all the remainder-men for every purpose except the lord's fine.

WYLDE, *Justice*. An admittance of a particular tenant is an admittance of all the remainders to all purposes but only the lord's fine: and if the custom be, that the fine paid by the first tenant shall go to all the remainders, then the admittance of the first man is to all intents and purposes an admittance of all that come after. In this case the possession of the lessee for years, is the possession of the remainder-man. In the case of *Baker v. Dereham* (a), there was a surrender to the use of a man and his heirs of copyhold land that descended according to the custom of *Borough-English*: the surrenderee died before admittance; and the opinion of the Court was, that the right would descend to the youngest according to the custom.

S. C. post. 120.  
S. C. 3. Keb. 263. 329.  
S. C. 1. Vent. 260.  
S. C. 2. Lev. 107.  
S. C. 2. Danv. 185.  
Ante, 96.

4. Co. 21. 3. Leon. 70. 4. Leon. 38. 1. And. 192. 1. Roll. Abr. 505. 1. Vent. 261.  
2. Sid. 61. 8. Mod. 73. 107. Fitzg. 287. 1. Peer. Wms. 63. 66. 3. Peer. Wms. 63.  
2. Ld. Ray. 1024. 2. Vern. 226. 1. Stra. 445. 4. Bac. Abr. 331. 1. Burr. 212.  
Gilb. Tenures, 162. 194. 2. Term Rep. 484.

(a) Coke's Copyholder, 70.

Blackborough and his Wife *against* Graves and Others. Case 9.

Hilary Term, 24. & 25. Car. 2. Roll 1216.

**U**PON a Case moved, HALE, *Chief Justice*, said, That if a tenant in common bring a *personal action* without his fellow joining in the suit, the defendant ought to take advantage of it in *abatement*; but if he plead *not guilty*, it shall be good; but then the plaintiff shall recover damages only for a *moiety*. So if a tenant in common seal a lease of ejection, he shall recover but a moiety.

If one tenant in common sue alone, he shall only recover his moiety, and the defendant may plead *co-tenancy in abatement*.

S. C. 3. Keb. 263. 329. S. C. Carth. . Co. Lit. 198. 202. 1. Show. 101. 12. Mod. 96. 301. 312. 341. 1. Ld. Raym. 312. 341. 2. Strange, 810. S. P. Heafman v. Moore in B. R. Mich. Term, 15. Geo. 2.

Anonymous.

Case 10.

**A** JUSTICE OF THE PEACE committed a brewer for not paying the duty of excise: The brewer was brought into court by *habeas corpus*.—SYMPSON. It ought to appear that he \* was a common brewer.—HALE, *Chief Justice*. The statute 12. Car. 2. c. 23. s. 36. doth prohibit the bringing of a *certiorari*, but not a *habeas corpus*. And want of averment of the matter of fact, may be amended in a return in court; and if it be not true, at their peril be it.—So it was mended.

Defect in form, or averment in fact, in the return to *habeas corpus* may be amended before the return is filed.

1. Vent. 19. 2. Lev. 128. 3. Keb. 434. Cro. Car. 133. 3. Mod. 164. 1. Salk. 350.  
2. Ld. Raym. 580. 603. 1. Stra. 391. Cowp. 407. 523. Dougl. 158.

Anonymous.

Michaelmas Term, 25. Car. 2. In B. R.

Cafe 11.

Anonymous.

Foreign attachment.

**M**ONEY owing upon a judgment given in the king's court cannot be attached.

See Cro. Car. 63. 1. Rol. 552.

Memorandum.

The promotion of Jones, North, and Finch, and the removal of Ashley.

**O**N November 17th, in this Term, SIR WILLIAM JONES, *Knt.* was made *Solicitor General* in the room of SIR FRANCIS NORTH, *Knt.* who was promoted to the office of *Attorney General*, in the place of SIR HENEAGE FINCH, *Knt.* who was made *Lord Keeper of the Great Seal*, in the room of LORD ASHLEY, who was, on Monday, 10. November, 1673, removed from the office of Lord High Chancellor of England.

HILARY

# HILARY TERM,

the Twenty-Fifth and Twenty-Sixth of Charles  
the Second,

I N

The King's Bench.

Friday, 23. January, 1673.

*Sir Matthew Hale, Knt. Chief Justice.*

*Sir Thomas Twifden, Knt.*

*Sir Richard Rainsford, Knt.*

*Sir William Wylde, Knt.*

} *Justices.*

*Sir Francis North, Knt. Attorney General.*

*Sir William Jones, Knt. Solicitor General.*

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\* *Baker against Bulstrode.*

• [ 104 ]  
Case 12.

**D**EBT UPON A BOND conditioned to perform an award. On a condition  
The condition was, That the defendant should seal and to execute a  
execute a release to the plaintiff. The defendant demurs, deed to the  
cause the plaintiff did not alledge in his declaration, a tender of satisfaction of  
release. It was urged, that the condition was not "to make," the plaintiff's  
t only "to seal and execute, &c."—But PER CURIAM, He is counsel, the  
and to do it without a tender. And the word "execute," or defendant, to  
word "seal," comprehends the making. And *Lamb's Case*, save the condi-  
Co. 23. was cited, tion, must ten-  
der the deed.

S. C. 3. Keb.  
S. C. Ray. 232. S. C. 1. Vent. 255. S. C. 2. Lev. 95. S. C. 2. Danv. 39. Ante, 67.  
Coll. Abr. 465. 3. Mod. 191. Cro. Jac. 661. 5. Co. 25. 10. Mod. 153. 189. 222. 420. 423.  
Ed. Ray. 1095. 1. H. Bl. Rep. 274.

# Hilary Term, 25. & 26. Car. 2. In B. R.

Case 13.

Warren *against* Prideaux.

Trinity Term, 24. Car. 2. Roll 1472.

A prescription to have a bushel of salt of every ship that comes laden with salt within a certain port, in consideration of maintaining the quay, and keeping a bushel to measure the salt, is not good.

S. C. 3. Keb. 247. 275.  
S. C. Ray. 232.

\* 105 }

S. C. 2. Lev. 96.  
S. C. 1. Freem.

255.  
Ante, 48.

Post. 231.  
3. Lev. 400.

425.  
Ray. 52.

1. Id. Ray.  
385.

2. Stra. 1228.

3. Burr. 1402.

1406.  
Cowp. 47.

1. Term Rep. 66c.

**A DISTRESS AND AVOWRY FOR TOLL.** The prescription was for toll in consideration of maintaining the key, and keeping a bushel to measure salt, viz. That in consideration thereof, he, and those, &c. have had, time out of mind, &c. a bushel of salt of every ship that comes laden with salt into *Slipper-point*.

**POLLEXFEN** for the avowant alledged, that the maintaining of the key is for public good: *Co. Magn. Charta*, 222. *Roll*. 265. It is true, it is not alledged, that they did actually use the weights and measures. 1. *Leon*. 231. But it being alledged, that the ship came within *Slipper-point*, it is enough to charge the plaintiff with the payment.—As for the distress taken, which is part of the ship's lading, viz. salt, it is objected, that it cannot be distrained, because it is part \* of the thing from which the duty ariseth: But I answer, That this is not like to a distress upon land, nor to be judged of according to the rules allowed in cases of such distresses. There were cited on this side 21. *Hen. 7. pl. 1. Cro. Eliz.* 710. *Smith v. Shepheard, Dyer* 352.

**COURTNEY, contra.** I conceive this prescription ought to have some consideration, and to be grounded on a meritorious cause, to bind a subject. The keeping of the bushel is no meritorious cause, because it is presumed that the party hath the use of it himself.

**HALE, Chief Justice.** The prescription is not for a port but a wharf. If any man will prescribe for a toll upon the sea, he must alledge a good consideration; because by *MAGNA CHARTA*, and other statutes, every one hath a liberty to go and come upon the sea without impediment.

**WYLDE, Justice.** This custom or prescription is laid, to have a bushel of salt of every ship that comes within the *Slipper-point*: If a ship be driven in by stress of weather, and goes out again the first opportunity that presents, shall that ship pay?

**HALE, Chief Justice.** If he had said, that he had a port, and was bound to maintain that port, and that he, and all those whose estate he had, &c. that might have been a good prescription: But in this case, there must be a special inducement and compensation to the subject by reason of those statutes, by which all merchants, and others, have liberty to come in and go out.

THE COURT inclined that the prescription was not good; and judgment was given for the plaintiff.

Lord

# Hilary Term, 25. & 26. Car. 2. In B. R.

## Lord Fitzwalter's Case.

Case 14.

**A** TRIAL AT BAR concerning the river of *Wall-fleet*: The question was, Whether the defendant had not the right of fishing there, exclusive of all others?

**HALE, Chief Justice.** In case of a private river, the lord's having the soil is good evidence to prove, that he hath the right of fishing; and it puts the proof upon them that claim *liberam piscariam*. But in case of a river that flows and reflows, and is an arm of the sea, there, *primâ facie*, it is common to all: and if any will appropriate a privilege to himself, the proof lieth on his side; for in case of an action of trespass brought for fishing there, it is, *primâ facie*, a good justification to say, that the *locus in quo* is *brachium maris, in quo unusquisque subjectus dom. regis \* habet et habere debet liberam piscariam*. In the river *Severn* there are particular restraints, as *gurgites*, &c. but the soil doth belong to the lords on either side: and a special sort of fishing belongs to them likewise; but the common sort of fishing is common to all. The soil of the river of *Thames* is in the king; and the lord mayor is conservator of the river, and it is common to all fishermen: and therefore there is no such contradiction betwixt the soil being in one, and yet the river being common for all fishers, &c.

See the case of the royal fishery of the river *Bann* in Ireland, Dav. Rep. 149. Salk. 137. Carter v. Murcot, 4. Burr. 2161. 2165. Seyman v. Courtnefs, 5. Burr. 2814. 2. Black. Com. 139.

The Mayor of *Lynn* v. Turner, Cowp. 16. Dougl. 56. 443. 517. 3. Term Rep. 253. The Mayor of *Orford* v. Richardson, 4. Term Rep. 437.

A person claiming a free fishery, a several fishery, or a common of fishery, must shew the foundation of his claim; for the right is *primâ facie* in all the king's subjects, or in the owner of the soil.

\* [ 106 ]  
S. C. 3. Keb. 242. 459. 555.  
S. C. 2. Lev. 139.  
S. C. 1. Free. 414.  
6. Mod. 73.  
2. Salk. 537.  
637.  
1. Salk. 357.  
3. P. Wms. 257.  
Davis's Rep. 55.  
16. Vinet, 354.

## Sedgewick against Goston.

Case 15.

Trinity Term, 24. Car. 2. Roll 347.

**HALE, Chief Justice,** said, That a writ of error in parliament may be returned *ad prox. parliament*. such a day; but if a particular day be not mentioned, then it is naught: and although there be a particular day expressed, yet if that day be at two or three Terms distance, the Court will adjudge it to be for delay; and it shall be no *superfedeas*. And he said he had looked into the Books upon the point. In THE REGISTER, he said, there is a *scire facias ad prox. parliament*. but not a writ of error.

Ante, 28. Post. 112. 285. Cro. Jac. 341. Russell's Ent. 320. 1. Ld. Ray. 16. 405.

A writ of error returnable on a day certain in the next parliament is good.  
S. C. Skin. 161.  
S. C. 3. Keb. 256.  
S. C. 2. Lev. 93.

# E A S T E R T E R M,

The Twenty-Sixth of Charles the Second,

I N

The King's Bench.

Wednesday, May 6, 1674.

*Sir Matthew Hale, Knt. Chief Justice.*

*Sir Thomas Twisden, Knt.*

*Sir Richard Rainsford, Knt.*

*Sir William Wylde, Knt.*

} *Justices.*

*Sir Francis North, Knt. Attorney General.*

*Sir William Jones, Knt. Solicitor General.*

• [ 107 ]

Cafe 1.

\* Anonymous.

An executor may be a witness concerning the estate of his testator, if he is not the residuary legatee. — **A** TRIAL AT BAR.—HALE, *Chief Justice*. An executor may be a witness in a cause concerning the estate if he have not the surplusage given him by the will. . And so I have known it adjudged (a).  
not the residuary legatee. — Plowd. 541. Co. Lit. 112. Ld. Ray. 730. 3. Willf. 95. Gilb. Evid. 120. 1. Bl. Rep. 365. 4. Burr. 2254. 1. Peer. Wms. 287. 290. Dougl. 139. 141. note (51.). 3. Term Rep. 27. 35.

(a) See the 25. Geo. 2. c. 6. f. 3.

\* Cafe 1.

Fountain against Coke:

The term is not extinguished by the lessees being tenant to the *præcipe*. **I**F a lessee for years be made tenant to the *præcipe* for suffering a common recovery, that doth not extinguish his term, because it was in him for another purpose.—To which THE WHOLE COURT agreed.  
S. C. 3. Bac. Abr. 453. S. C. 1. Vent. 195. 280. 7. Co. 38. Cro. Jac. 643. 2. Roll. Rep. 145. 8. Mod. 60. 10. Mod. 151. 12. Mod. 340. 385. 512. 1. Peer. Wms. 289. 3. Peer. Wms. 181. 288. 1. Vern. 20. 2. Vern. 700. Abr. Eq. 223. Comyns, 90. 1. Stra. 34. 101. 2. Stra. 1253. 2. Ld. Ray. 1166. Skin. 223. 3. Bac. Abr. 453. 1. Burr. 79. Cowp. 704. Cruise on Recov. 48. 1. Term Rep. 741.

See the 27. Hen. 8. c. 10. f. 3.

Jacob

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Jacob Aboab's Case.

Case 2.

**D**EBT UPON A BOND was brought against him by the name of *Jacob*; and he pleaded, that he was called and known by the name of *Jaacob*, and not *Jacob*.—But it was over-ruled. The name of *Jacob* instead of *Jaacob* an immaterial misnomer.—S. C. 3. Keb. 278. 284. 2. Roll. Abr. 137. Co. Lit. 3. Cro. Eliz. 50. 176. Cro. Jac. 175. 1. Saund. 135.

Sir John Thorowgood's Case.

Case 3.

**O**FFLEY moved to quash an indictment of nuisance for stopping a water-course in *Kensington*, because it ran "*in detrimentum omnium inhabitantium*," &c.—WYLD, *Justice*. I have known it ruled naught for that cause.—So quashed. Indictment for nuisance, "to the detriment of the inhabitants," is bad.—S. C. 3. Keb. 284. 2. Roll. 83. pl. 11. Cro. Eliz. 90. 414. Cro. Jac. 382. 2. Leon. 183. 9. Co. 113. 1. Vent. 208. 1. Saund. 135. 6. M. d. 453. 2. Willf. 57. 1. Burr. 259.

\* *Benson against Hodson.*

Case 4.

*Hilary Term, 25. & 26. Car. 2. Roll 696.*

**A** WRIT OF ERROR of a judgment in the county palatine of *Lancaster* in replevin: the defendant makes consuance as bailiff to *Anne Moseley*. *A* covenants to levy a fine to the use of himself and the heirs male of his body; remainder in tail to several others; remainder to his own right heirs; PROVIDED, That if there be a failure of issue male of his body, and *Dame Elizabeth* be dead, and *Anne Moseley* be married or of the age of twenty-one years, then she shall have two hundred pounds *per annum* for ten years: then *Rowland Moseley* dies leaving issue *Sir Edward Moseley*: *Sir Edward* makes a lease for one thousand years, then levies a fine and suffers a recovery, then dies without issue male: and the contingents did all happen.

The lands were the lands of *Rowland Moseley*, and he covenanted to levy a fine of them to the use of himself, and the heirs males of his body, the remainder in tail to several others, the remainder to his own right heirs; PROVIDED, That if there shall be a failure of issue male of his body, and *Dame Elizabeth* be dead, and *Anne Moseley* be married or of the age of twenty-one years, then she shall have two hundred pounds *per annum* for ten years: then *Rowland Moseley* dies leaving issue *Sir Edward Moseley*: *Sir Edward* makes a lease for one thousand years, then levies a fine and suffers a recovery, then dies without issue male: and the contingents did all happen.

The question is, Whether this rent-charge of two hundred pounds a-year be barred by the fine and recovery, and shall not operate upon the lease?

LEVINZ. I conceive the fine is not well pleaded; for nothing is said of the *king's silver*, and if that be not paid it is void (a): then thousand years, levies a fine and suffers a recovery, and dies without issue; his sister *B*, being married and of age.—The annuity to *B*, is barred by this recovery; for the remainder is barred out of which it issued, and it cannot be charged on the lease; for that was derived out of an estate tail preceding the commencement of the rent.—S. C. Ray. 236. S. C. 2. Lev. 28. S. C. 3. Keb. 274. 287. 292. S. C. 1. Ficem. 362. S. C. 4. Bac. Abr. 330. 1. Sid. 102. Cro. Eliz. 769. Gilb. Eq. Rep. 16. 9. Mod. 178. 11. Mod. 181. 196. 210. 214. 12. Mod. 32. 513. Prec. Chan. 435. 1. Peer. Wms. 104. 509. 520. 536. 3. Peer. Wms. 171. 250. 235. Salk. 570. 1. Bl. Rep. 227. 611. Ambler, 382. Pigot on Recov. 21. 138. Cruise on Recov. 232. 2. Bac. Abr. 549. 552. Sanders on Uses and Trusts, 193.

(a) This exception was over-ruled. S. C. 2. Lev. 31.

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BENSON  
against  
HODGSON.

\* [ 199 ]

they have pleaded a common recovery, but not the execution of it by entry (a). Now I conceive the common recovery doth destroy *the estate-tail* but not *the rent*. The reason why a common recovery is a bar, is because of the intended recompence. Now that is a fictitious thing, as in *Beaumont's Case* (b), in the case of *Stone v. Newman* (c), and in *Cuppledick's Case* (d). Now this rent is a mere possibility, and hath no relation to the estate of the land. Then again, when the recovery was suffered, the rent was not in being: now a recovery will never bar but where the estate is dependent upon it either in reversion or remainder; for by that case of *Moor*, pl. 201. I conceive he is barred, because the reversion is barred by the fine; and also by the case of *White v. Gerishe* (e) in *Cro. Eliz.* and by the same case reported 2. *And.* 190. *Noy* 9. Another reason is, Because the rent remains in the same plight notwithstanding the fine. Another reason is, It was a meer possibility at the time of the fine and recovery; and the case of *Pell v. Brown* (f) is for me. In our case there is no estate *in esse* to be barred. Then this estate is granted out of the estate of the scoffees; as in *Whitlock's Case* (g) the estates for years which there is a power to make, shall be said to \* precede all the limitations. There is no other way for securing younger children's portions by the same deed, but it may be done by another deed, as in the case of *Goodyer v. Clarke* (h).

MR. FINCH, *contra*. I conceive the rent is barred, upon the reason of *Capell's Case* (i). They say not. FIRST, Because it doth only charge the remainder. SECONDLY, The intended recompence doth not go to it. THIRDLY, This lease for one thousand years doth precede the fine. The law will never invert the operation of a conveyance; but *ut res magis valeat*: *Bredon's Case* (k). Then, for the intended recompence, that cannot be the reason of barring a remainder; for the estate-tail was barred before. 3. *Lean*. 157. But *Moor* saith (l), it is the favour the law hath for recoveries; and till the reversion takes place in possession, the rent cannot arise out of the reversion, nor so long as this lease is in being.

HALE, *Chief Justice*. You make two great points. FIRST, Whether the rent be barred by the common recovery?—SECONDLY, Whether the rent-charge shall arise out of the lease for years? This is plain; If tenant in tail grant a rent-charge, and suffer a

(a) This exception was also over-ruled. S. C. 2. Lev. 31.

(b) 9. Co. 138. 2. Danv. 141. 146.

(c) Cro. Car. 427. 460.

(d) 3. Co. 5.

(e) Cro. Eliz. 717. 768. 792.

Qwen, 12. 2. And. 170. Moor, 575.

Noy, 9.

(f) 1. Eq. Ab. 187. Cro Jac. 590. Brink. 1. 5. Pal'm. 135. 2. Roll, Rep. 196. 216. Godb. 252.

(g) 8. Co. 71. 1. Brownl. 106.

(h) 1. Keb. 73. 169. 246. 461.

1. Sid. 102. 1. Lev. 35.

(i) 1. Co. 61. Poph. 5. Moor,

154. Jenk. 250. 1. And. 282.

4. Leon. 150.

(k) 1. Co. 76. 2. And. 66. Jenk.

267.

(l) Moor's Rep. fo. 73.

common

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common recovery, the rent-charge will not be avoided: so that if tenant in tail be, rendering a rent, a recovery will not bar that, though it doth a reversion; but the reason of these cases is, because the estate of him that suffers the recovery is charged with the rent. Therefore if there be a limitation of a use upon condition, and *cestui que use* suffer a recovery, that will not destroy the condition, the estate being charged with it; for the recoveror can have the estate only as he that suffered the recovery had it; and therefore there is an act of parliament to enable recoverors to distrain without attornment. Therefore, so long as any one comes in by that recovery, he comes in in continuance of the estate-tail, and coming in so, he is liable to all the charges of tenant in tail. Now what is the reason why tenant in tail suffering a common recovery, a rent by him in remainder shall be barred? The reason is, Because the recoveror comes in in the continuance of that estate that is not subject to the rent, but is above all those charges; now no recompence can come to such a rent. And therefore there is another reason why a common recovery will bar: At common law upon an estate-tail, which was a fee-simple conditional, a remainder could not be limited over, because but a possibility; but now comes that statute *de donis conditionalibus*, and makes it an estate-tail; and a common recovery is an inherent privilege in the estate, that was never taken away by that statute *de donis*; the law takes it as a conveyance excepted out of the statute, as if he were absolutely seised in fee, and this by construction of law. It is true, there can be no recompence to him that hath but a possibility. But the business of recompence is not material as to this charge; and the reason of *White's Case* (a), and other cases put, explain this. Now what difference between this and *Capel's Case* (b)? Say they, There the charge doth arise subsequent, but here the charge doth arise precedent. Why, I say, the charge doth arise precedent to the remainder, but subsequent to the estate-tail; for it is not to take effect till the estate-tail be determined. It was doubted in the queen's time, whether a remainder for years was barred? But it hath been otherwise practised ever since, and there is no colour against it. Now you do agree, That the remainder to the right heirs of one living shall be barred, for the estate is certain, though the person be uncertain; so long as the rent doth not come within the compass and limitation of the estate-tail, the rent is extinct and killed, there is nothing to keep life in it: but whether doth not the lease for years preserve it? Heretofore it was a question among young men, Whether if tenant in tail granted a rent-charge for life, then makes a lease for three lives, in this case though the rent before would have died with tenant in tail, yet this rent will continue now during the three lives? which it will. And it hath been questioned, If he had made a lease for years, instead of the

BENSON  
against  
HUDSON.  
Cro. Car. 598.

\* [ 110 ]

(a) *White v. Gerist*, Cro. Eliz. 727. 7 (8. 792. Owen, 12. 2. And. 170. Moor, 575. Noy, 9. (b) 1. Co. 61. Poph. 5. Moor, 154. Jerik. 250. 1. And. 282. 4. Leon. 150.

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BROWN  
against  
MODSUN.

lease for lives, if that would have supported the rent? Now in our case, if the lease for years were chargeable, the rent would arise out of that; but if this rent should continue, then most men's estates in England would be shaken.

WYLDE, *Justice*. The lease for years doth not preserve the rent, but the common recovery doth bar it: for in the case of *Pell v. Browne* (a), the recovery could not bar the possibility; for he was not tenant in tail that did suffer the recovery, but he had only a fee-simple determinable, and the contingent remainder did not depend upon an estate tail; nay, did not depend by way of remainder, but by way of contingency: it is true, JUSTICE DODDERIDGE did hold otherwise; but the rest of the Judges gave judgment against him upon very good reason.

\* [ 111 ] \* TWISDEN, *Justice*. I never heard that case cited but it was grumbled at.

1. Keb. 31.  
Crutson Recov.  
232.  
4. Burr. 1929.

HALE, *Chief Justice*. But to your knowledge and mine they always gave judgment accordingly. A man made a gift in tail, determinable upon his non-payment of a thousand pounds, the remainder over in tail to B. with other remainders; the tenant in tail before the day of payment of the thousand pounds suffered a common recovery, and doth not pay the thousand pounds; yet because he was tenant in tail when he suffered the recovery, by that he had barred all, and had an estate in fee by that recovery.

At a day after HALE, *Chief Justice*, said, the rent was granted before the lease for years, and is not to take effect till the estate-tail be spent, and a common recovery bars it: if there be tenant in tail reserving rent, a common recovery will not bar it: so if a condition be for payment of rent, it will not bar it; but if a condition be for doing a collateral thing, it is a bar (b). And so if tenant in tail be with a limitation so long as such a tree shall stand (c), a common recovery will bar that limitation.

(a) Cro. Jac. 590. 1. Eq. Abr. cery, 10. June, 1743, in the case of 187. Bridg. 5. Palm. 131. 2. Roll. Reddy v. Coleston.—Note to the fourth edition  
Rep. 196. 216. Godb 282.

(b) Same point determined in chan- (c) See Sanders on Uses, 193.

Case 5.

Lampiere against Mereday.

At what time an  
audita querela  
may be brought.

S. C. 3. Keb.  
201.  
S. C. 1. Danv.  
631.  
1. Roll. Abr.  
106.  
12. Mod. 105.  
598.  
1. Ld. Ray.  
439.

AUDITA QUERELA was brought before judgment entered, which they could not do; which THE COURT agreed: whereupon Counsel said, it was impossible for them to bring an *audita querela* before they were taken in execution, for the plaintiff will get judgment signed, and take out execution on a sudden and behind the defendant's back. THE COURT ordered the *posse* to be brought in for the defendant to see if execution were signed. And, at a day after, HALE, *Chief Justice*, said, if an *audita querela* be brought after the day in bank, though the judgment be not entered up, yet the Court make them enter up the judgment as of that day; so that they shall not plead "*nul tiel record*."

The

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**Marshal of the King's Bench *against* Middleton. Case 6.**

(LDE, *Justice*, said, A sheriff's bond for *ease and favour* was void at common law; and so it was declared in *Sir Lenthall's Case*.

**1. Sid. 383-**

1. 181. 318. 1. Vent. 237. 1. Lev. 254. See Hard. 464. 2. Lev. 103. 10. Co. 100.  
—See the statute 23. Hen. 6. c. 9. and the case of Rogers v. Reeves, 1. Term Rep. 418.

\* [ 112 ]

\* Stokes *against* Verryer.

ISDEN, *Justice*, upon opening of a record by MR. DENN, id. It was already adjudged in this court (*a*), that a rent out of *gavelkind* land is of the nature of the land, and descend as the land doth.

Gavelkind rent is of the nature of the land.  
S. C. 3. Keb.  
202

**S. C. 3. Keb.**  
**292.**

S. C. Finch C. R. 292. See Robinson on Gavelkind, 83.

(a) In the case of *Randal v. Jenkins*, ante, 96.

## Lifter *against* Stanley.

### Cafe 8.

ACTION OF DEBT upon a bond. SYMPSON moved in  
 rest of judgment. The bond was dated in *March*, and the  
 ion was for payment *super vicessimum octavum diem MARTII*  
*equentem*. It was *sequentem* which refers to the day, which  
 e understood of the same month. If it had been *sequentis*,  
 : had referred to *March*, and then it had been payable the  
 ar.—But THE COURT was of opinion, that it should be  
 ood the current month. SYMPSON cited a case of *Read v.*  
*on*, wherein he said it had been so held.

Indebted on a bond dated 20. March, to pay the 28. March then next following, it shall be intended, after verdict, the current month. S. C. 3. Keb. 291.  
 1. Roll. Abr.

S. C. 3. Keb.  
291.  
1. Roll. Abr.  
442.

## Ayres *against* Lenthall.

### Cafe 9.

**LE, Chief Justice.** Formerly if execution were gone before writ of error delivered or shewed to the party, it was not **A writ of error will remove a judgment after** *superjedeas.*

**A writ of error**  
will remove a  
judgment after  
*teste*, and before  
execution.

ALDE, *Justice*. He must not keep the writ in his pocket, ink that will serve.

another day HALE, *Chief Justice*, said, It shall not be a *subpoena* unless shewed to the party, and he must not foreswear himself having it allowed; for if it be not allowed by the Court four days, it is no *subpoena*.

*Notice of a writ of error taken out is only a temporary supersedeas; for if it be not allowed within four days, execution may be taken out.*

LE, *Chief Justice.* A writ of error taken out, if it be not  
to the clerk of the other side, nor allowed by the Court, is  
*rescinded* to the execution; and if a writ of error be sued,  
g *teste* before the judgment be given, if the judgment be  
before the return, it is good to remove it (though at first  
four days, execution may be taken out.  
S. C. 3. Keb.  
308.  
Ante, 28. 45

S. C. 3. Keb.  
e 3c8.  
t Antc, 28. 45  
106.

15. 1. Vent. 30. 255. 2. Keb. 139. Peph. 122. 6. Med. 130. 8. Med. 147.  
16. 1. Stra. 612. 765. 819. 2. Hawk. P. C. 421. See Jacques v. Nixon, 1. Term Rep.  
17. Cary v. Campbell, 3. Term Rep. 399.

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AYRES  
against  
LINTHALL.

he said it was so in respect of a *certiorari*, but not of a writ of error). And he said, that judgment, whenever it is entered, hath relation to the *day in bank*, viz. the first day of the Term; so that a writ of error returnable after will remove the record whenever the judgment is entered.

### Cafe 10.

#### The King *against* St. Andrews, Holbourn.

On *not guilty* to an indictment for not repairing a road, a person cannot give in evidence, that others are bound to repair it.

UPON a motion concerning the amending of *Leather-Lane*, HALE, *Chief Justice*, said, If you plead *not guilty*, it goes to the repair or not repair; but if you will discharge yourself you must do it by prescription, or *ratione tenuræ*, and say, that such a one *ratione tenuræ*, or such part of the parish, hath always used time out of mind, &c.

S. C. 1. Danv. 787. S. C. 3. Keb. 301. S. C. 1. Vent. 256. S. C. 3. Salk. 183. S. C. 1. Freem. 521. 2. Lev. 112. 1. Sid. 140. 1. Keb. 498. 2. Inst. 701. 370. 2. Roll. Abr. 597. 10. Mod. 150. 382. 12. Mod. 15. 178. 409. 1. Ld. Ray. 725. 2. Ld. Ray. 922. 1169. 1. Strange, 180. 3. Bac. Abr. 58. Andrews, 276. Annally's Rep. 259. 4. Burr. 2511. 5. Burr. 2702. 1. Hawk. P. C. 369. 2. Term Rep. 106.

\* [ 113 ]

### Cafe 11.

#### \* Backwell *against* Bardue.

In debt on bond for the payment of a legacy, the defendant is estopped from saying the testator revoked the will.

AN ACTION OF DEBT upon a bond. The condition was, Whereas one *Bardue* did give by his will so much, and if he should pay it such a day, then, &c. The defendant pleads, *bene et verum est* he did give him so much by his will and testament; but he revoked that, and made another last will.—THE COURT said, he was estopped to plead so.—HALE, *Chief Justice*. It doth not appear when the bond was made, and it shall be intended to be made after the party's death.—Judgment for the plaintiff.

S. C. 3. Keb. 303.

Ante, 15. Moor 420. 1. Roll. Abr. 872. 8. Mod. 33. 323. 12. Mod. 217. 1. Term Rep. 86. 701. 2. Term Rep. 171. 3. Term Rep. 441.

### Cafe 12.

#### Deering *against* Farrington.

*Hilary Term, 25. & 26. Car. 2. Roll 221.*

If A. "assign and transfer" to B. all the money that shall be allowed in lieu of his share in a ship, B. may maintain an action against A. on the implied covenant arising from the words "assign and transfer," notwithstanding the subject is a *chose in action*.—S. C. 3. Keb. 304. 1. Freem. 269. Co. Lit. 213. 265. a. 4. Co. 80. 3. Co. 2. 3. Leon. 108. 3. Mod. 40. 173. 232. 10. Mod. 225. 12. Mod. 554. 2. Ld. Ray. 1242. 2. Bl. Rep. 520. Amb. Rep. 260.

AN ACTION OF COVENANT, declaring upon a deed by which the defendant *assignavit et transsevit* all the money that should be allowed by any order of a foreign State to come to him in lieu of his share in a ship.

TOMPSON moved, that an action of covenant would not lie, for it was neither an *express* nor an *implied* covenant. 1. Leon. 179.

HALE, *Chief Justice*. You should rather have applied yourself to this, viz. Whether it would not be a good covenant

against

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against the party? As if a man doth *demise*, that is an implied covenant; but if there be a particular express covenant, that he shall quietly enjoy against all claiming under him, that restrains the general implied covenant; but it is a good covenant against the party himself. If I make a lease for years reserving rent to a stranger, an action of covenant will lie by the party to pay the rent to the stranger.

*Deed made against FARRINGTON.*

Then it was said, It was an assignment for maintenance.

HALE, *Chief Justice*. That ought to have been averred.

Then it was further said, That an assignment transferring when it cannot transfer, signifies nothing.—HALE, *Chief Justice*. But it is a covenant, and then it is all one as if he had covenanted that he should have all the money that he should recover for his loss in such a ship.—TWISDEN, *Justice*, seemed to doubt.—But judgment.

• [ 114 ]  
Case 13.

• Lord Mordaunt *against* Earl of Peterborough.

**T**RIAL AT BAR, on an issue out of chancery. The question was, Whether the *Earl of Peterborough* was tenant for life only of the manor of *Mayden*? The defendant did not appear. The plaintiff thereupon desired to examine his witnesses, that so he might preserve their evidence.—TWISDEN, *Justice*. When they do not appear, what good will that do you? for they will say, you set up a man of straw, and pull him down again. The testimony of witnesses cannot be perpetuated by a *viva voce* examination at common law.

There was a former deed of entail with a power of revocation in it, and after the deed exhibited was made, whereby the estate was otherwise settled, and there was a jointure to the present lady, and done by persons of great learning in the law: the revocation was to be by deed under my lord's hand and seal in the presence of three witnesses. Now the question was, Whether this second deed was a revocation in law, and an execution of that power?—And THE COURT told THE COUNSEL that the jury should find it specially if they would; but they refused. A deed contains a proviso that A. by the consent of his wife in writing may revoke it; *Quære*, If this power is executed by the wife sealing a release, with a clause revoking the former deed?

HALE, *Chief Justice*. In the case of *Snape v. Sturt (a)* it was held, that if there be a power of revocation, and a lease for years made, it doth suspend *quoad* the term; but after it is good. Then it hath been questioned formerly, if there be such a power, and the person make a lease and release, Whether it was a revocation? But shall we conceive the learned Counsel in this case would have ventured upon an implicit revocation, and not have made an express revocation? so that you must be nonsuit, or find it specially. S. C. ante, 64. S. C. 3. Keb. 1. 305. 2. Roll. Abr. 263. Cro. Car. 472. W. Jones, 392. Co. Lit. 237. Pow. on Pow. 17. 112.

. Com. Dig. 632. 1. Peer. Wms. 164. Comyns, 224. 3. Ch. Cases, 126. 2. Term Rep. 684. Term Rep. 665. and see Sprange v. Barnard, 2. Brown's Chan. Cases, 505. and Macadam v.egan, 3. Brown's Chan. Cases, 310.

(a) Cro. Car. 472. 2. Roll. Abr. 215. 262. 701. 1. Jones, 392.

But

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An issue whether "tenant for life," is not proved, by evidence of a tenancy for life with reversion in fee.—S. C. 3. Keb. 305.

But the issue being, If he were only tenant for life? he said, he must go back to the chancery to amend it; for by the deed produced, he hath an estate for life and the reversion in fee.

Cafe 14.

Burgis against Burgis.

In Chancery.

\* [115] A MAN having a long LEASE, settled it in trust upon himself for life, the remainder to his wife for life, the remainder to the first son of their two bodies, the remainder to the second son, and so to the tenth son; and if they \* should have no son or sons, then the remainder to such daughter and daughters of their bodies, &c. The man and his wife died, and left only a daughter, who preferred her bill against the trustees for the executing of this remainder to her.

If a grant be made of a term of years to A. for life, with remainder to A. and B. his wife for life; remainder to the first son of their two bodies, and so on to their other sons successively; and if they should have no sons, then with remainder over to their daughters, the remainder is void, although A. and B. never have a son, but

The question was, Whether this remainder be a good remainder, or whether it be void?

FINCH, Lord Keeper, held it was a void remainder, because it doth depend upon so many and such remote contingencies, for otherwise it would be A PERPETUITY. And he said, he would allow one contingency to be good, viz. that to the first son, though the first son was not *in esse* at the time of his decease. And he cited a case in *Dyer*; and *Matthew Manning's Cafe* (a); and *Leon Lovie's Cafe* (b); and *Lampett's Cafe* (c); and the case of *Child v. Bayly* (d).

a daughter only: for such remote contingencies tend to create a perpetuity.—S. C. 1. Chan. Cases, 193. S. C. Pollexf. 40. S. C. Finch C. R. 91. See ante, 55. note (a) 1. Sid. 37. 450. 1. Vent. 39. 9. Mod. 25. 93. 101. 124. 10. Mod. 402. 419. 11. Mod. 44. 52. 278. 283. 592. Gilb. Eq. Rep. 75. 79. 105. Abr. Eq. 191. 1. Vern. 234. 304. 462. 2. Vern. 600. Fitzg. 314. Prec. Chan. 455. Caf. Temp. Talb. 21. 1. Peer. Wms. 58. 132. 198. 432. 500. 534. 544. 664. 748. 2. Peer. Wms. 421. 608. 618. 622. 3. Peer. Wms. 113. 257. 300. 1. Ch. Rep. 28. 2. Com. Dig. "Chancery" (4. W. 20.). 1. Bro. Ca. Ch. 294. Dougl. 264. 2. Term. Rep. 720. 3. Term. Rep. 83. 87. 143. 356. 484. 763. 1. Brown's Chan. Cases, 170. 187. 2. Brown's Chan. Cases, 127. Cafes Temp. Talbot, 3d edition, page 27.

A term devised And he said, he did deny LORD COKE's opinion in *Leon Lovie's Cafe* (e), which saith, that in case of a lease settled to one the inheritance, to A. and the heirs male of his body, does not determine by his death without issue, but, like a term in gross, shall go to his executors.—See the Case of *Clare v. Clare*, Cafes Temp. Talb. 22.

- (a) 8. Co. 94. Co. Ent. 149.
- (b) 2. Roll. Abr. 419. 702. 10. Co. 78. Moor. 772. 2. Brownl. 103. Cro. Jac. 61.
- (c) 2. Roll. Abr. 404. 10. Co. 46. 2. Brownl. 172. Which Ent. 426.
- (d) 1. Eq. Abr. 192. 2. Roll. Rep. 129. Faint. 48. 333. Cro. Jac. 459.

- 1. Jones, 15.—But this case is denied to be law, Carth. 267.; and by L. C. NOTTINGHAM, in the duke of Norfolk's Cafe, 3. Chan. Rep. 35. See also 2. Ld. Ray. 150. 4. Term Rep. 69.
- (e) 2. Roll. Abr. 419. 792. 10. Co. 78. Moor. 772. 2. Brownl. 103. Cro. Jac. 61.

and

## Easter Term, 26. Car. 2. 12 C.

and the heirs males of his body, when he dies the estate is determined, for he said it shall go to his executors (a). And he said, there was the same case with this in this court, *Backhurst v. Bel-lingham* (b).

Burgis  
against  
Burgis.

And he said, that the common law did complain that this Court did encroach upon them, whereas they are beholden to this Court for their rules in equity; as formerly, when ecclesiastical persons made leases, a *misnomer* would avoid them; but *ELSMERE, Lord Chancellor*, in his time would, notwithstanding the *misnomer*, make them good.

(a) Moor, 809. 1. Roll. Abr. 611. "Chancery" (4. W. 21.). 3. Chan. Pollex. 24. 10. Co. 87. 1. Sid. 37. Caf. 30. Sheph. Touch. 446. Co. Caf. Chan. 230. 1. Salk. 231. and Lit. 20. 2. note (5). Fearn, 342. 1. Peer. Wms. 366. 2. Com. Dig. (b) Pollex. 33.

## Freeman against Taylor.

Case 15.

**A**NOTHER CASE IN CHANCERY. One mortgaged lands, then confessed a judgment, and died. The mortgagee buys of the heir the equity of redemption for two hundred pounds. The bill was preferred by the creditor by judgment against the mortgagee and heir, either to be let in by paying the mortgage-money, or else that the two hundred pounds received by the heir, might be assets.—And THE COURT said, that the mortgagee's estate should not be stirred; but it was left by FINCH, *Lord Keeper*, to be made a case, Whether the two hundred pounds should be assets in the hands of the heir (a)?

A judgment against a mortgage obtained subsequent to the mortgage, does not attach upon assets produced by a release of the equity of redemption.

307. 3. Lev 286. 1. Show. 244. 10. Mod. 12. 254. 426. 462. 477. 487. 11. Mod. 5. 12. Mod. 346. 381. 611. 2. Vern. 61. Fitzg. 41. 103. 142. Prec. Chan. 39. Abr. Eq. 241. Cases Temp. Talb. 220. 1. Ld. Ray. 53. 1. Peer. Wms. 34. 101. 355. 678. 730. 775. 2. Peer. Wms. 145. 364. 381. (620.). 542. 3. Peer. Wms. 9. 166. 217. 330. 341. 401.

S. C. 3. Keb.

(a) *Sed quare*, If this distinction of judgment being obtained after the mortgage, be not, in this respect, done away? 354. 7. Mod. 40. 1. Powell's Mortgages, 286. 291. See also 1. Peer. Wms. 412. 2. Atk. 50. 2. Black. Rep. 1230. 1. Brown's Cases Chan. 246. 256. Cole v. Warden, 1. Vern. 410.; Plucknet v. Kirk, 1. Vern. 411.; Smith v. Angel, 2. Ld. Raym. 783. 1. Salk.

\* [ 116 ]

\* The Case of Mosedell, the Marshal of the King's Bench. Case 16.

**A** TRIAL AT BAR; an action of debt brought against *Mosedell* for the escape of one *Reynolds*. The plaintiff said, he could prove that he was at London three long vacations.

On a habeas corpus ad testificandum directed to a gaoler to

carry a prisoner to the assizes, if he permit him to go at large under colour of the writ, it is an escape, notwithstanding the prisoner return into custody; but if *nil debet* be pleaded, the gaoler may give *fresh suit* in evidence.—S. C. 3. Keb. 305. 1. Sid. 13. 1. Co. 45. Cro. Car. 14. Dalr. Sh. 551. Comyns, 422. 554. 6. Mod. 78. 8. Mod. 120. 10. Mod. 394. 11. Mod. 57. 69. 79. 15. 12. Mod. 31. 227. 583. 634. 1. Ld. Ray. 241. 390. 2. Ld. Ray. 283. 3. Com. Dig. "Escape" (c). 2. Bl. Rep. 1048. Gilbert's Evidence, 283. 2. Term Rep. 5. 125.

TWISDEN,

Easter Term, 26. Car. 2. In B. R.

THE CASE OF TWISDEN, *Justice*. It is hard to put three escapes upon THE  
MOSEDELL, MARSHAL, for he may be provided only for one, and he cannot  
THE MARSHAL OF THE KING'S give in evidence a *fresh pursuit*, but it must be pleaded.  
BENCH.

HALE, *Chief Justice*. I always let them give in evidence a *fresh pursuit* upon a *nil debet*.

And WYLDE, *Justice*, said, it was generally done (a).

So they gave evidence of an *babeas corpus ad testificandum*, and that the prisoner went down too long beforehand, and staid too long after the assizes were done at Wells in Somersetshire, and that he went back threescore miles beyond Wells before he returned again for London.

HALE, *Chief Justice*. If an *babeas corpus* be granted to bring a person into court, and the sheriff let him go into the country, it is an escape. And though he be not bound to bring him the direct way, because he may be rescued, yet he ought not to carry him round about a great way for the accommodation of the party; if he doth, it is an escape; but by this evidence you let him go back threescore miles, to which there can be no answer. An *babeas corpus* returnable *immediatè* is not fixed to an hour, but to a convenient time.—They answered, that he went back to carry back some writings (b).

COUNSEL. Here is an escape of one of the parties, who dies before the action brought, whereby the whole charge is survived to the other before the action brought; and, Whether this shall purge the escape? is the question; or, How far it shall purge it?

WYLDE, *Justice*. Before you brought your action the debt is gone, as to the escape.

HALE, *Chief Justice*. We are made the engines of doing all the mischief if this shall go unpunished, being by colour of an *babeas corpus*.

The jury brought in a verdict for the plaintiff, who declared in debt for six thousand two hundred pounds.

(a) But now by 8. & 9. Will. 3. c. 27. s. 6. "No retaking on *fresh pursuit* shall be given in evidence in any action of escape against THE MARSHAL of the King's Bench, or THE WARDEN of the Fleet prisons, or THE KEEPER of any other prison, unless the same be *specially pleaded*; nor shall such special plea be received, unless oath in writing be first made and filed by the marshal, &c. in the office of the respective courts, that such escape was without his consent,

"privy, or knowledge; and if such affidavit shall afterwards appear to be false, the deponent, on conviction, shall forfeit FIVE HUNDRED POUNDS." See also the statutes 27. Geo. 2. c. 17. and the 1. Ann. c. 6.

(b) Letting a man that was arrested go to the next house, which was situated in another jurisdiction, held to be an escape, Hilary Term, 12. Geo. 2. B. R. *inter Sheriff of Hampshire and Godfrey*.—Not to the fourth edition.

## \* Green against Proude.

Case 17.

**I**N EJECTMENT ON A TRIAL AT BAR, the first question was, Whether a will or no will? The plaintiff produced a deed indented, made between two parties, the man and his son: and the father did agree to give the son so much, and the son did agree to pay such and such debts and sums of money: and there were some particular expressions resembling the form of a will; as, that he was sick of body, and did give all his goods and chattels, &c. but the writing was both sealed and delivered as a deed; and they gave evidence, that he intended it for his last will; which, THE COURT said, was a good proof of his will (a).

A written instrument, tho' in form a deed, if in substance a will, may be given in evidence as a will.

S. C. 3. Keb.

310.

S. C. 1. Vent.

257.

S. C. 2. Danv.

539.

Plo. 344. Moor, 177. 341. 356. Cro. Jac. 145. Cro. Eliz. 100. 2. Leon. 35. Allen, 2. 55. 1. Ch. Caf. 248.

(a) By 29. Car. 2. c. 3. "All devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence and by his express direction, and be subscribed, in his presence, by three or four credible witnesses." See 3 Lev. 1. Freeman. 486. 2. Chan. Cafes, 109. Prec. in Chan. 185. 1. Peer. Wms. 740. 1. Vezey, 127. Gilb. Evid. 4th edit. 74. 1. Burr. 548. Pow. on Dev. 14.

**SECONDLY**, The defendant then setting up an entail, the plaintiff exhibited an exemplification of a recovery in the *Marquis of Winchester's court* in *ancient demesne*. The other side objected, that they did not prove it a true copy.—But because it was ancient, THE COURT said, they should not be so strict upon the evidence of it; for the other side said, the court-rolls were burned in *Basing-house*, in the time of the Wars.—HALE, *Chief Justice*. I remember a case, where one had gotten a presentation to the parsonage of *Gosnall*, in *Lincolnshire*, and brought a *quare impedit*, and the defendant pleaded an appropriation; there was no license of appropriation produced, but because it was ancient, the Court would intend it.

An exemplification of the court-rolls of a recovery in *ancient demesne* shall be received in evidence, if the original record be destroyed.

3. Leon. 79.

3. Co. 31.

Allen, 2. 55.

1. Roll. Abr.

618.

1. And. 34.

1. Atk. 446.

1. Sid. 315. 362. Hardres, 323. 10. Co. 92. b. 98. 2. Salk. 285. 1. Bull. N. P. 228. 230. 1. Stra. 185. 526. 1. Willf. 48. 3. Com. Dig. 277. 1. Term Rep. 41. Gilb. Ev. 22.

See 10. Ann. c. 18. and 8. Geo. 2. c. 6. f. 21. and 14. Geo. 2. c. 20. f. 4.

**THIRDLY**, Then they objected, that they ought to prove seisin in the tenant to the *præcipe*.—HALE, *Chief Justice*. It being an ancient recovery, we will not put them to prove that. He said, he *Mayor of Bristol* had offered in evidence an exemplification of a recovery under the town-seal of houses in *Bristol*, the records being burned; and that exemplification was allowed for evidence.

If possession has continued from the time of an ancient recovery, the Court will presume a surrender by tenant for life to make a tenant to the

*præcipe*.—S. C. 1. Vent. 257. 1. Ch. Ca. 292. Cro. Jac. 455. Cruise, 31. 2. Stra. 1179. 267. 2. Burr. 1065. Pigot on Recov. 41. Lutw. 1549. 2. Atk. 44.

FOURTHLY,

## Easter Term, 26. Car. 2. In B. R.

Fine levied by tenant for life is a forfeiture, but not by tenant in tail. **FOURTHLY, HALE, Chief Justice,** If *tenant in tail* accept a fine *come ceo, &c.* this doth not alter his estate: if *tenant for life* accept of a fine *sur consance, &c.* he doth forfeit his estate; but it doth not alter the estate for life.

2. Co. 55. b. 36. a. 9. Co. 106. 1. Roll. Abr. 852. Co. Lit. 252. 2. Lev. 202.  
2. Leon. 264. 4. Leon. 217. Dyer, 148.

A recovery of lands in *ancient demesne*, describing them as lying in *Dale*, although there are several *vills* in the parish, is good.

Ante, 78.

\* [ 118 ]

**FIFTHLY,** The recovery is of land in *Kingscleare*, whereas the land claimed is in a particular vill called——; and the vills are several, and there are distinct courts in every vill.—**HALE, Chief Justice.** There are several tithings of *Dale, Sale, and Downe*; there is a tithing-man in every particular place; but the constable of *Dale* goes through all; these may go for several vills, or one vill: \* there may be a manor that hath several little manors within it, wherein are held several courts for the ease of the tenants, but all but one manor; and a writ of right close is, *quod plenam rellam, &c.* and runs to the bailiff of the manor, and may extend to the precinct of the whole manor; as the manor of *Barton* hath several little manors under it, yet all within the manor. Where there is a writ of *right close* in *ancient demesne*, it is not like a demand to a sheriff here, where he hath his direction for so many acres.—**MAYNARD, Serjeant.** But then he must demand it in the particular vill where it is.—**HALE, Chief Justice.** If a *præcipe quod reddat* be of land in a *parish* where it must be in a *vill*, there may be exception to the writ; but if he recover, it is good, for now the time is past: and so where it is *infra manerium*, if he recover, it is good.

### Case 18.

### Browne's Case.

*Venus* changed after cause removed.

**A**N ACTION brought in *Canterbury-town*: the defendant removes it by *habeas corpus*: then the plaintiff declares here. It was moved that it might be tried in some other county, because the Judges came there so seldom.—**THE COURT.** Let them shew cause why they should not consent; and if they will plead *nil debet*, the plaintiff will be willing to let them give any thing in evidence.

In debt for rent, entry and suspension may be given in evidence of the general issue of *nil debet*.—Ante, 7. 3c.

2. Roll. Abr. 677. 1. Leon. 104. 2. Sid. 151. 1. Vent. 358. Cro. Eliz. 222. 1. Gulb. Evid. Luffit's edit. 335. Cowp. 242.

**SIMPSON** said, It was the opinion of all the Judges, that, upon *nil debet* pleaded, entry and suspension may be given in evidence, which the Court did not deny:—so **THE COURT** ordered the other side to shew cause why they should not consent.

### Case 19.

### Hillyard's Case.

An attorney cannot sue in an inferior court for his bill of costs in king's bench.—S. C. 3. Keh. 386. Ante, 23.

1. Lev. 54. 11. Mod. 167. 12. Mod. 251. 1. Com. Dig. "Attorney" (B. 17.). Dougl. 381. 3. Term Rep. 573. 4. Term Rep. 24. 456. and the statute 3. Jac. 1. c. 7. and 2. Geo. 2. c. 23. s. 23.

**HILLYARD, an Attorney,** sued for his fees in this court, in the court at *Bristol*.—But **THE COURT** said, An attorney ought not to waive this court.

## \* Bushell's Case.

Case 20.

OTION was made by SIR WILLIAM JONES for the *Lord Mayor Starling* and the *Recorder Howell*: one *Bushell* not lie against an action against them for false imprisonment; and because the plea was long, he prayed he might have time to plead.

*J. Chief Justice.* I speak my mind plainly, that an action doth lie; for a *certiorari* and an *habeas corpus*, whereby the proceedings are removed hither, are in the nature of a writ of error; and in the case of an erroneous judgment given by a Judge which is reversed by a writ of error, shall the party bring an action of false imprisonment against the Judge? No, against the officer neither. The *habeas corpus* and writ of error though it doth make void the judgment, it doth not make void the proceeding of the process void to that purpose; and the matter one in a course of justice: they will have but a cold business of it. An *habeas corpus* and *certiorari* is a writ of right, the writ the party can bring.—So day was given to shew

An action will not lie against a magistrate for false imprisonment, in consequence of acts done by him in the character of a Judge.  
S. C. post. 184.  
S. C. 2. Jones, 13.  
S. C. Vaugh. 135.  
S. C. 3. Keb. 322.  
S. C. Freem. 1. Post. 145. 184.  
12. Co. 24.  
2. Mod. 118.  
Salk. 396.

1. 386. 2. Bl. Rep. 1145. 1. Ld. Ray. 454. 468. 470. Cowp. 476. Johnston v. 1. Term Rep. 493.

## Lord Teynham against Mullins.

Case 21.

Hilary Term, 25. &amp; 26. Car. 2. Roll 28.

TRIAL AT BAR about a fraudulent deed (a).—*HALE, Chief Justice.* There are three things to be considered, consideration, and bona fide: now the bona fide is opposite to fraud. I remember a case in *Twine's Case* (b); if the son is absolute, and the father with advice of friends doth settle so that he shall not spend all, though there be not a consideration of money, yet it is no fraudulent deed; and a deed may be voluntary, and yet not fraudulent, otherwise most of the settlements in England would be avoided.—And so said *TWISDEN*,  
S. C. 3. Keb. 322.  
S. C. 2. Lev. 105.  
Ante, 76.  
Abr. Eq. 170.  
9. Mod. 80. 96.

1. Rep. 122. Prec. in. Chan. 84. 10. Mod. 247. 469. 471. 478. 489. 497. 1. Vern. 46. 473. Cases Temp. Talb. 65. Comyns, 255. 1. Petr. Wms. 6c. 204. 354. 577. 581. Wms. 171. 255. 358. 464. 606. 3. Petr. Wms. 222. 337.—A voluntary deed may be void against the party who made it, though it might be set aside as against creditors or a fair purchaser.  
*Boughton v. Boughton*, in chancery, 5. December, 1739, reported 1. Atkins, 623.

The case was thus: *Lord Teynham* seised in fee, in consideration of a bargain between his eldest son and *Englefield*, and of a marriage-portion of 1000*l.* to be paid, which was afterwards made a settlement on his said son and the heirs of his body upon the *Englefield* begotten; remainder to the second son in tail; remainder to the right heirs. *Lord Teynham* was afterwards in debt, and three years before he died he sold the lands for a valuable consideration, and died. The eldest son and his wife also died without issue. The question was, Whether, under these circumstances, the remainder limited to

the second son was fraudulent as against a purchaser with notice of the settlement, a covenant being inserted in the conveyance to him against all incumbrances, save this remainder to the second son, against which he had taken a collateral security?—THE COURT were of opinion, that the deed, as to this remainder, was not fraudulent. See *Cadogan v. Kennet*, Cowp. 434.; *Doc v. Rutledge*, Cowp. 705.; *Stephens v. Oliver*, 2. Brown's Chan. Cases, 90.; *Evelyn v. Templar*, 2. Brown's Chan. Cases, 148. 3. Brown's Chan. Cases, 12.

(b) 3. Co. 80. Cro. Jac. 179.

L. I.

K

Blackbourn

Case 22.

\* Blackburne *against* Graves.

Hilary Term, 24. & 25. Car. 2. Roll 1216.

A copyholder having a daughter by his first wife, and a son and a daughter by his second wife, surrenders his estate to his eldest daughter for five years, with remainder to his own right heirs, and dies. The daughter is admitted. The son dies. The five years expire. The admittance of the daughter is the admittance of the son in remainder as right heir; and he being so seised creates a *possessio fratris*, which occasions the estate to descend to his sister of the whole blood only; and not to his two sisters together, as heirs to their father. — But this *constructive* admittance of the remainder-man shall not prejudice the lord's fine.

S. C. ante, 102.  
S. C. 3. Keb.  
263. 329.  
S. C. 1. Vent.  
260.  
S. C. 2. Lev.  
107.

\* [ 121 ]

S. C. 2. Danv.  
183.

4. Co. 22. Dyer, 292. 1. Roll. Abr. 502. Moor, 125. 272. 3. Leon. 70. 4. Leon. 98.  
3. Lev. 308. 1. Roll. Abr. 502. 1. And. 122. Fitzg. 287. 1. Peer. Wms. 63. 2. Ld. Ray.  
1024. 1224. Stra. 445. 487. 1. Burr. 212. Gilb. Tenures, 162. 194. Dyer, 291.

(\*) Cro. Eliz. 524. Moor, 465. Gouldsb. 95. Co. Copyh. 72.

Draper

**T**ROVER for one hundred loads of wood. On not guilty pleaded, a special verdict was found, that the lands are copyhold lands, and surrendered to the use of one for eleven years, the remainder for five years to the daughter, the remainder to the right heirs of the tenant for eleven years. The eleven years expire; the daughter is admitted; the five years expire: and there being a son and daughter by one venter, and a son by another venter, the son of the first venter dies before admittance, and the daughter of the first venter and her husband bring *trover* for cutting down of trees.

The question was, If the admittance of tenant for years was the admittance of the son in remainder?

LEVINZ. I conceive it is; and then the son is seised, and the daughter of the whole blood is his heir; and he cited the case of *Gypping v. Bunny* (a).

WYLDE, *Justice*. The estate is bound by the surrender.

HALE, *Chief Justice*. If a man doth surrender to the use of *John Styles*, till admitted there is no estate in him, but remains in the surrenderor; but he hath a right to have an admittance: if a surrender be to *J. S.* and his heirs, his heir is in without admittance if *J. S.* dies. About this there hath indeed been diversity of opinions, but the better opinion hath been according to LORD COKE's opinion. I do not see any inconvenience why the admission of tenant for life or years should not be the admittance of all in remainder, for fines are to be paid, notwithstanding, by the particular remainders; and so the Books say it shall be no prejudice to the lord.

TWISDEN, *Justice*. I think it is strong, that the admission of lessee for years is the admission of him in remainder; for as in a case of *possessio fratris* the estate is bound, so that the sister shall be heir; so here the estate is bound, and goes to him in remainder.

HALE, *Chief Justice*. It shall not prejudice the lord; for if a fine be assessed for the whole estate, there is an end of the business; but if a fine be assessed only for a particular estate, the lord ought to have another. If a surrender be to the use of *A.* for life, the remainder to his eldest son, &c. or to the use of *A.* and his heirs, and then *A.* \* dies, the estate is in the son without admittance, whether he take by *purchase* or *descent*.—And judgment was given accordingly.

Easter Term, 26. Car. 2. In B. R.

Draper *against* Bridwell.

Case 23.

*Easter Term, 26. Car. 2. Roll 320.*

**A**LL THE COURT held, that an action of debt will lie upon a judgment, after a writ of error brought. *Debt lies on a judgment after error brought.*

S. C. 3. Keb. 330. 2. Vent. 261. Dougl. 6.

Peters *against* Prideux.

Case 24.

**T**WISDEN, *Justice*. They in the spiritual court will give sentence for tithes for *rakings*, though they be never so voluntarily left; which our law will not allow of. *Rakings are not titheable.*

S. C. 3. Keb. 251. 284. 332.

427. 2. Roll. Abr. 645.

Ireton *against* Newton.

Case 25.

**W**YLDE, *Justice*, said, That actions personally transitory, though the party doth live in *Chester*, yet they may be brought in the king's courts. *Transitory actions may be in B. R. though the party live in Chester.*

*Chester.*—S. C. 3. Keb. 333. Cowp. 177.

The Mayor of London *against* Depestre.

Case 26.

**H**ALE, *Chief Justice*. Shew a precedent where a man can *wage his law* in an action brought upon a prescription for a duty; as in action of debt for toll (*a*) by prescription, you cannot wage your law. *Loy-gager is not allowed in an action of debt upon a prescription for a*

duty.—S. C. 3. Keb. 337. S. C. 2. Lev. 106. S. C. 1. Vent. 261. S. Mod. 303. 11. Mod. 127. 12. Mod. 669. 681. 1. Ld. Ray. 500. 2. Ld. Ray. 992.

(*a*) Dougl. 728. notes. 1. Term Rep. 616.

Pybus *against* Mitford.

Case 27.

**H**ALE, *Chief Justice*, delivered his opinion, WYLDE, RAINSFORD, and TWISDEN, *Justices*, having first delivered their's. *If A. covenant to stand seised to the use of the heirs male of the body of the said A. begotten, or to be begotten, on the body of B. his wife, with reversion to his*

HALE. I think judgment ought to be given for the defendant, whether the son take by *descent* or by *purchase*. I shall divide the case: **FIRST**, Whether the son doth take by descent? **SECONDLY**, Admitting he doth not, whether he can take by purchase? We must make a great difference between conveyances of estates by way of use, and at common law. A man cannot convey to himself an estate by a conveyance at common law, but by way of use he may. But now in our case here doth return by open "own right heirs," A. shall take an estate for life by implication, in order to make a good remainder in tail.—S. C. ante, 93. S. C. post. 159. S. C. 3. Keb. 239. 316. 338. S. C. 2. Lev. 75. S. C. Ray. 228. S. C. 1. Vent. 372. S. C. 1. Freem. 351. 369. Post. 237. Prec. in Chan. 54. 342. 467. 2. Salk. 679. 6. Mod. 134. 2. Ld. Ray. 854. 3. Salk. 336. 11. Mod. 189. 2. Peetr. Wms. 1.

**Pybus against Mitford.** Gilb. Dev. 99. ration of law, an estate to *Michael* for his life, \* which is con-joined with the limitation to his heirs. The reason is, Because a limitation to the heirs of his body, is in effect to himself. This is perfectly according to the intention of the parties. It is objected, that the use being never out of *Michael*, he hath the old use, and so it must be a contingent use to the heirs of his body. But I say, We are not here to raise a new estate in the covenantor, but to qualify the estate in fee in himself; for the old estate is to be made an estate for life, to serve the limitation. Further objection is, that it shall be the old estate in fee; as if a man devise his lands to his heirs, the heir is in of the old estate. But I answer, If he qualify the estate, the son must take it so; as in *Hutton*, fol. 60. 85. so in this case is a new qualification: 1. *Roll. Abr.* 789. 15. Jac. If a man make a feoffment to the use of the heirs of the body of the feoffor, the feoffor hath an estate-tail in him; *Pannell v. Fenne* (a), *Englefield v. Englefield* (b). SECONDLY, I conceive, if it were not possible to take by descent, this would be a contingent use to the heirs of the body. Objection is, that it is limited to the heir, when no heir in being. Why, I say, it would have come to the heir at common law, if no express limitation had been; and it cannot be intended, that he did mean an heir at common-law, because he did specially limit it.

(a) Moor. 350. Cro. Eliz. 347. (b) Moor. 303. Poph. 18. 7. Co. 11. Jenk. 267. 4. Leon. 135. 169.

Case 28.

Craig against Norfolk.

Recovery of damages for disturbance of office, is sufficient evidence of *seisin* in an *assise* against the same defendant.

**TRIAL AT BAR OF AN ASSISE** for the serjeant at mace's place in the house of commons. The plaintiff had his patent read; and THE COURT asked, If they could prove *seisin*? To which the plaintiff's counsel answered, That they had recovered in an action upon the case for the mean profits, and had execution.—**PER CURIAM**, For aught we know, that will amount to a *seisin*.

**TWISDEN, Justice.** Upon your grant, since you could not get actual *seisin*, you should have gone into chancery, and they would have compelled him to give you *seisin*.

**HALE, Chief Justice.** A man may bring an action upon the case for the profits of an office, though he never had *seisin*.

S. C. 3. Keb. 326. 343. S. C. 2. Lev. 108. 120. S. C. Lilly Ent. 47. Carth. 169. 2. Term Rep. 355.

To maintain an assise for a patent office, the party must prove a *seisin* in law. 1. *Roll. Abr.* 270. 4. Co. 10. a. 2. Salk. 463. Cowp. 502. 2. Term Rep. 355.

The record was read of his recovery in an action upon the case for the profits.—**HALE, Chief Justice.** This is but a *seisin* in law, not a *seisin* in fact.

The counsel for the plaintiff much urged, that the recovery and execution had of the profits, was a sufficient *seisin* to entitle them to an assise.

It was objected, \* that the plaintiff was never invested into the office.—HALE said, an investiture does not make an officer when he is created by patent, as this is; but he is an officer presently. But if he were created an herald at arms (as in *Segar's Case*), he must be invested before he can be an officer: a person is an officer before he is sworn. The defendant is the pernor of the profits, and you have recovered damages: is not this a seisin against you? The Jury shall find it specially.—But the plaintiff chose rather to be nonsuit, because of the delay by a special verdict.

In an *elective* office the party must be *invested* to gain *possession*; but in an office by *patent* he is *in* by the creation.

12. Mod. 199. Fitzg. 293. 3. Bac. Abr. 726. 1. Ld. Ray. 51. 159. 163. 563. 74. 290. 2. Bl. Com. 317. Co. Lit. 9. a.

And THE COURT told them, they could not withdraw a juror in an assise, for then the assise would be depending.

A juror cannot be withdrawn in an *assise*.

The Roll of the action upon the case was in *Michaelmas Term*, in the nineteenth year of *Charles the Second*, Roll 557.

# TRINITY TERM,

The Fifteenth of Charles the Second,

I N

The Exchequer Chamber.

Friday, 19. June, 1663.

## KING'S BENCH.

*Sir Robert Forbes, Knt. Chief Justice.*

*Sir Tho. Mallett, Knt. (a)*

*Sir Tho. Twisden, Knt.*

*Sir Wad. Wyndham, Knt.*

*Justices.*

## COMMON PLEAS.

*Sir John Vaughan, Knt. Chief Justice.*

*Sir Robert Hyde, Knt.*

*Sir Tho. Tyrrell, Knt.*

*Samuel Brown, Esq.*

*Justices.*

## EXCHEQUER.

*Sir Orlando Bridgman, Knt. Chief Baron.*

*Sir Edward Atkins, Knt.*

*Sir Christopher Turner, Knt.*

*Sir Richard Rainsford, Knt.*

*Barons.*

(a) MR. JUSTICE MALLET, by reason of his age, was discharged from his office on Tuesday 16th June 1663.

\* [ 124 ] \* THE ARGUMENT OF MR. JUSTICE HYDE, IN THE CASE OF

Case 1,

Manby *against* Scott.

Trinity Term, 1659. Roll 1460.

In the Exchequer Chamber.

If a wife *slops*, and, on her husband refusing to be reconciled, she lives apart from him; and during this separation, a tradesman furnish her with goods contrary to the express prohibition of the husband, the husband is not liable to pay for them, although they are found to be necessary for his wife, and she has no separate maintenance.—S. C. 1. Keb. 69. 80. 206. 337. 361. 383. 429. 441. 482. S. C. 1. Sid. 109. to 130. S. C. 1. Lev. 4. S. C. 1. Bac. Abr. 296. that

**H**YDE, *Justice.* A FEME COVERT departs from her husband against his will, and continues absent from him divers years: afterwards the wife desires to cohabit with her husband again, but the husband refuses to admit her; and from

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that time the wife lives separate from him. During this separation, the husband forbids a tradesman of *London* to trust his wife with any goods or wares; yet for divers years before and afterwards, allows his wife no maintenance. The tradesman, contrary to the prohibition of the husband, sells and delivers divers wares to the wife upon credit, at a reasonable price; and the wares so sold and delivered to the wife are *necessary* for her, and suitable to the degree of her husband. The wares are not paid for; wherefore the tradesman brings an action upon the case against the husband; and declares, that the husband was indebted to him in forty pounds for divers wares and merchandizes formerly to the husband sold and delivered; and that the husband, in consideration thereof, did promise to pay him the said forty pounds; that the husband hath not paid the same to him, although thereunto required; and for that money the action is brought against the husband. And, Whether this action will lie against the husband for the wares thus sold and delivered to the wife, against the will, and contrary to the prohibition of the husband, or not? is the question.

THIS CASE is the meanest that ever received resolution in this place; but as the same is now handled, it is of as great consequence to all the king's people of this realm, as any case can be. It concerns every individual person of both sexes that is, or hereafter shall \* be, married within this kingdom, in the first and nearest relation, that is, betwixt *man* and *wife*. The holy state of matrimony was ordained by Almighty God in Paradise, before the Fall of Man, signifying to us, that mystical union which is between Christ and his Church; and so it is the first relation: and when two persons are joined in that holy state, they twain become one flesh; and so it is the nearest relation. This case toucheth the man, in point of his power and dominion over his wife; and it concerns the woman, in point of her substance and livelihood. I will deliver my opinion plainly and freely, according as I conceive the law to be, without favouring the one, or courting the other sex. I hold, that judgment ought to be given for the defendant. The case hath been so fully argued, and all the authorities so particularly vouched by my brothers, who have already delivered their opinions, that nothing is left for me to say, which hath not been spoken by them in better terms than I can express myself. It will be a trouble to your lordships for me to repeat their arguments, and yet without doing so, it will be impossible for me to speak any thing to the purpose. It shall be my endeavour, therefore, rather to answer the reasons and objections given and made by my two brothers, who have so copiously argued for the woman's power, than to argue the case on the same grounds which have been already delivered (a). It is agreed by all my brothers who have argued, as I conceive, that a *feme covert* generally cannot bind or charge her husband by any contract made by her without the authority or assent of her husband precedent

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1. Vent. 24. 42.
2. Vent. 155.
- Allen, 61.
- Noy, 79. 126.
- Latch. 126.
- March. 60. 82.
- Styles, 18.
- Yelv. 166.
- Palm. 343.
1. Roll. Abr. 6.
1. Leon. 312.
- Cro. Car. 254.
355. 494.
- Cro. Jac. 661.
2. Show. 283.
6. Mod. 239.
9. Mod. 31. 42.
- 104.
10. Mod. 6. 33.
70. 163. 205.
- 245.
11. Mod. 241.
12. Mod. 244.
372. 603.
- \* [ 125 ]
- Gilb. Eq. Rep.
1. 145. 149.
- Precc. in Chan.
- 502.
- Abr. Eq. 61.
1. Ld. Ray. 444.
2. Ld. Ray.
- 1006.
1. Strange, 127.
647. 706.
2. Strange, 875.
1122. 1214.
1. Peer. Wms.
- 482.
3. Peer. Wms.
169. 273. 339.
409. 412.

(a) See LORD CHIEF BARON HALE's argument at length, 1. Bac. Abr. 296.

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or subsequent, either exprefs or implied. But the question in this case is, If the contract of a *feme covert* for wares for her necessary apparel, made without the consent, and contrary to the prohibition of her husband, shall bind her husband?

FIRST, I hold, that the husband shall not be charged by such a contract, although he do not allow any maintenance to his wife.

SECONDLY, Admit the husband were chargeable generally by such a contract; yet I conceive that this action doth not lie for the plaintiff, as this declaration is, and as this verdict is found against the defendant in this particular case.

• [ 126 ] \* FOR THE FIRST, Every gift, contract, or bargain, is, or contains an agreement; for the contractor or bargainer wills, that the donee or bargainee shall have the things contracted for, and the other is content to take them; and so in every contract there is a mutual assent of their minds, which mutual assent is an agreement, as in *Fogassa's Case* (a); and afterwards in the same case (b) it is said, that AGREEMENT is a word compounded of two words, viz. *aggregatio* and *mentium*; so that *aggreumentum* is *aggregatio mentium*; or thus *aggreumentum* is no other but a union or conjunction of two minds in any matter or thing done, or to be done; according to that definition of SIR EDWARD COKE (c), *contractus est quasi actus contra actum*: but a *feme covert* cannot give a mutual assent of her mind, nor do any act without her husband; for her will and mind, as also herself, is under, and subject to the will or mind of her husband; and consequently she cannot make any bargain or contract, of herself, to bind her husband. THE SECOND GROUND of the law of *England* is the law of God (d). In the Beginning when God created woman an helpmate for man, he said, "they twain shall be one flesh;" and thereupon our law says, that husband and wife are but one person in the law: presently after the Fall, the judgment of God upon woman was, "Thy desire shall be to thy husband, for thy will shall be subject to thy husband, and he shall rule over thee (e)." Hereupon our law put the wife *juxta potestate viri*, and says, *quod ipsa potestatem sui non habeat, sed vir suus*, and she is disabled to make any grant, contract, or bargain, without the allowance or consent of her husband (f). The Books and authorities of our law which prove this point, have been all particularly vouched already, and I will not repeat them again, nor do I know any one particular point to the contrary. The words of the Book are observable, namely, "If a *feme covert* make a contract, or buy any thing in the market, or elsewhere, without the allowance or con-

(a) Plowd. 17. Powelson Contracts, 7.

(b) Plowd. 17.

(c) Co. Lit. 47.

(d) Dr. & St. c. 6. fo. 12.

(e) Gen. ch. iii. ver. 16.

(f) Bracl. bk. 3. c. 32. fo. 15.  
1. Roll. 351. pl. 45.

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"sent of her husband, although it come to the use of the husband, yet the contract is void, and shall not charge the husband; but if a man command or license his wife to buy things necessary, or agree that she shall buy, he shall be bound by this command or licence (a)." Which proves, that it is not the buying or contract of the wife which binds or charges the husband (for that is void in itself), but \* the command or license of the husband which makes it the contract or bargain of the husband. \* [ 127 ]

As to my BROTHER TWISDEN saying, that "all those Books are where the wife deals or trades as a *factor* to her husband, and all grounded upon that reason," the words themselves prove the contrary; for the difference taken by all these Books is, between the buying and contract of the wife without the knowledge or consent of her husband, and a buying or contract had by the wife with allowance or command of the husband. In the first case, the buying or contract is void; in the other, the allowance or command makes it good, as the contract or bargain of the husband: besides, weigh the inconveniencies which would follow if the law were otherwise. Judges, in their judgments, ought to have a great regard to the generality of the cases of the king's subjects, and to the inconveniencies which may ensue thereon, by the one way or the other. Judges, in giving their resolutions in cases depending before them, are to judge of inconveniencies as things illegal; and an argument *ab inconvenienti* is very strong to prove that it is against law (b). Then examine the inconveniencies which must ensue, if the law were according to my brothers TWISDEN and TYRRELL's opinions: if the contract or bargain of the wife made without the allowance or consent of the husband shall bind him upon pretence of necessary apparel, it will be in the power of the wife (who, by the law of God and of the land, is put under the power of the husband, and is bound to live in subjection unto him) to rule over her husband, and undo him, maugre his head, and it shall not be in the power of the husband to prevent it. The wife shall be her own carver, and judge of the fitness of her apparel, of the time when it is necessary for her to have new cloaths, and as often as she pleaseth, without asking the advice or allowance of her husband: and is such power suitable to the judgment of Almighty God inflicted upon woman for being first in the transgression? "Thy desire shall be to thy husband, and he shall rule over thee." Will wives depend on the kindness and favours of their husbands, or be observant towards them as they ought to be, if such a power be put into their hands?

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See the case of  
Altenwood,  
1. Co. 52.

1. Bac. Abr.  
295.

\* [ 128 ]

\* SECONDLY, Admit that in truth the wife wants necessary apparel, woollen and linen, and thereupon she goes into *Pater-noster*-  
Year-Book,  
11. Hen. 6.  
pl. 30.  
Brownl. 47. Allen, 61. Litt. Rep. 307. Hutt. 105. 1. Roll. Abr. 350. Salk. 116.  
2. Ld. Ray. 1006. 6. Mod. 171. 2. Show. 283. Stra. 647. 706. 875. 1. Bac. Abr. 295.

(a) 21. Hen. 7. pl. 70. F. N. B. 120. Old. N. B. 62. 1. Roll. Abr. 351.  
(b) Plowd. 279. 379.

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row, to a mercer, and takes up stuff, and makes a contract for necessary cloaths; thence goes into *Cheapside*, and takes up linen there in like manner; and also goes into a third street, and fits herself with ribbands, and other necessities suitable to her occasions, and her husband's degree. This done, she goes away, disposes of the commodities to furnish herself with money to go abroad to *Hyde-park*, to score at *gleeke*, or the like. Next morning this good woman goes abroad into some other part of *London*, makes her necessity and want of apparel known, and takes more wares upon trust, as she had done the day before; after the same manner she goes to a third and fourth place, and makes new contracts for fresh wares, none of these tradesmen knowing or imagining she was formerly furnished by the other, and each of them seeing and believing her to have great need of the commodities sold her; shall not the husband be chargeable and liable to pay every one of these, if the contract of the wife doth bind him? Certainly, every one of these hath as just cause to sue the husband as the other, and he is as liable to the action of the last as the first or second, if the wife's contract shall bind him; and where this will end no man can divine or foresee. As for my BROTHER TYRRELL saying, "We may not alter the law because an inconvenience may follow thereon," that is true: but we ought to foresee and provide against such inconveniencies as may arise, before we adjudge or declare, in a particular case in question, Whether the law be so or not? And that is the case here. It is objected, That the husband is bound of common right to provide for and maintain his wife; and the law having disabled the wife to bind herself by her contract, therefore the burthen shall rest upon the husband, who by law is bound to maintain her, and he shall do it *volens volens*: generally the antecedent is most true; for she is "bone of his bone, flesh of his flesh," and no man did ever hate his own flesh so far as not to preserve it. But apply this general proposition to our particular case, and then see what logic there is in the argument. I am bound to maintain and provide for my wife: therefore my wife, departing from me against my will, shall be her own \* carver, and take up what apparel she pleaseth upon trust, without my privity or allowance, and I shall be bound to pay for it: this is our case, for there is not a word throughout the whole verdict that the wife wanted necessary apparel; that she ever acquainted her husband with any such matter; that she ever desired the husband to supply her with money to buy it, or otherwise to provide for her; or that the husband denied, refused, or neglected to do it. Besides, although it be true, that the husband is bound to maintain his wife, yet that is with this limitation, *viz.* so long as she keeps the station wherein the law hath placed her; so long as she continues a help-meet to him; for if a woman of her own head, without the allowance or judgment of the Church, which hath united them in the holy state of matrimony, and which only can separate that, or dissolve this union, depart

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depart from her husband against his will, be the pretence what it will, she doth thereby put herself out of the husband's protection; so that during this unlawful separation, she is no part of her husband's care, charge, or family. The king is the head of the commonwealth: his office is, and he is bound of right, to protect and preserve his subjects in their persons, goods, and estates: and on that ground every loyal subject is said to be within the king's protection. But a man may put himself out of the king's protection by his offence; as by forsaking his allegiance to the king, and owning or setting up any foreign jurisdiction, and then every man may do to him as to the king's enemy, and he shall have no remedy or recovery by the king's laws or writs (a). The husband is the head of the wife as fully as the king is the head of the commonwealth; and the wife by the law is put *sub potestate viri* and under his protection, although he hath not *potestatem vitæ et necis* over her, as the king hath over his subjects. When the wife departs from her husband against his will, she forsakes and deserts his government; erects and sets up a new jurisdiction; and assumes to govern herself, besides at least, if not against, the law of God and the law of the land. Therefore it is but just, that the law for this offence should put her in the same plight in the petit commonwealth of the household, that it puts the subject for the like offence in the great commonwealth of the realm; and this according to \* the civil law, NAMELY, \* [ 130 ]

"*Si uxor propria (sine culpa mariti) sit extra consortium viri, non tenetur maritus extunc ei extra consortium suum existenti aliquam liter subministrare; videtur enim virum alendi obligatione fore exemptum, quoniam culpa sua extra viri consortium est.*" For, "NUPTIÆ sunt conjunctio maris et feminae, et consortium ejus divini et humani juris communicatio" (b)." FLETA (c), speaking of Appeals, hath this expression: "*Femina de morte viri sui inter brachia sua interfecti, et non aliter potuit appellare.*" BRAC-TON (d) is much to the same purpose; "*Non nisi in duobus casibus femina appellum habeat, SCILICET, non nisi de violentiâ corpori suo illatâ, sicut de raptu et de morte viri sui interfecti inter brachia sua;*" and the words of the writ of Appeal are suitable thereunto, SCILICET, "*venit idem A. B. et nequiter et in feloniam, &c. occidit ipsum virum suum inter brachia sua, &c.*" By the words "*inter brachia sua,*" in those ancient authors, is understood the wife, which the dead person lawfully had in possession at the time of his death; for she ought to be his wife of right, and also in possession (e). The words of the writ are observable; "*occidit virum suum inter brachia sua,*" and prove that the woman ought to be "*inter brachia viri sui,*" or otherwise she hath not the privilege of a wife. By an argument *à pari*, as the wife shall not have remedy against the murderer of her husband after his death, if he were not *inter brachia sua* at the time of his death, *pari ratione* she shall not have support or maintenance

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See the case of  
Mynes, Plowd.  
315. and Fitz.  
Nat. Brev. 232

(a) The Year-Book 27. Edw. 3. pl. 1.

(b) DIGEST, de Ritu Nuptiarum.

(c) Bk. 1. c. 33.

(d) Bk. 3. ch. 24. f. 148.

(e) Com. S. Mag. Chaita, fo. 68.

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• [ 131 ]

from her husband in his life, when she put herself *extra brachia sua* against his will. But it is objected by my brother TYRRELL, that it appears not in whose default this departure was, Whether in his or her default? Thereto I answer, that the law doth not allow a wife to depart from her husband in any case, or for any cause whatsoever of her own head. An express command is laid upon her by the law of God to the contrary: "To the married I command, yet not I, but the Lord, Let not the wife depart from her husband (a)." The provision which our law hath made for the safeguard of the person of a woman, in case of cruelty by her husband, and for her maintenance in case the husband refuses to allow it, proves, That it is not lawful for the wife to depart from her husband of her own head upon any pretence whatsoever (b). \* If the wife be in fear or in doubt of her husband that he will beat or kill her, she shall have a *supplicavit* out of the chancery against her husband, and cause him to find sureties that he will not beat nor entreat her otherwise than in civil manner, and for to order and rule her, &c (c). The words of the writ are, "*Quod ipsum B. coram te corporaliter venire facias, et ipsum B. ad sufficient. manucaption. inveniend. &c. quod ipse prefut. B. bene et honeste tractabit gubernabit ac dampnum et malum aliquod eidem A. de corpore suo alit. quam ad virum suum ex causa regiminis et castigationis uxoris sue licite et rationabiliter pertinet, non faciet nec fieri procurabit.*" And if the husband refuse to give or allow necessary and fitting maintenance to his wife, the law hath provided a remedy for her by complaint to the ordinary in the ecclesiastical court (d). Next it is alledged by my brother TYRRELL, "that the wife in our case did return, and desired to cohabit with her husband again, which he refused, and so she is remitted to her former condition." Admit that be true, yet her return hath not put her in a better condition than she was in before her departure, in which case she could not be her own carver, and have charged her husband (according to her pleasure) with apparel; but was to be clothed in such sort as her husband thought fit. Besides, in our case the wife departed from her husband, and lived from him divers years after (before the wares sold or the action brought); then she desired to cohabit with him, which he refused to admit; and from that time she lived from him. This is all that appears in our case: and is this offence so easily purged with a bare desire to cohabit, without any other submission and satisfaction given of the better carriage in futuro? The law of God says (e), "Wives, be in subjection to your husbands as unto the Lord; for the husband is the head of the wife, as Christ is head of

(a) Corinthians, ch. vii. ver. 10.

(b) 1. Sid. 129. 1. Salk. 118. 2. Show. 282. 3. Atk. 547. 4. Burr. 2078. 2177.

(c) Fitz. N. B. 179.

(d) Litt. 78. 1. Ch. Rep. 44. 164.

(e) St. Peter, ch. iii. ver. 4. Ephes. ch. vth, ver. 22.

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Church." The Church declares, that one of the principal  
 or which marriage was ordained, is for the mutual society,  
 and comfort, which the one ought to have of the other in  
 rity and adversity: it is also there said, the woman of her-  
 a contracting of marriage, makes a solemn vow *in facie ec-*  
 to live together with her husband in the holy state of ma-  
 ny, to obey him and serve him, to love him, and keep  
 n sickness and in health, till death them do part. \* The \* [ 132 ]  
 n our case, by departing from her husband against his will,  
 s all those commands, and her own vow; she makes a vo-  
 ry separation and temporary divorce between herself and her  
 nd; she deprives him of that mutual society, help, and com-  
 which she owes to him, for divers years: and are all these  
 ces washed away with a bare desire, without submission or  
 ition? Certainly they are not; confession and promise of  
 e obedience ought to precede her remitter, or restitution to  
 riviliges of a wife. The Prodigal Son in the Gospel said,  
 will arise and go to my father, and say, I have sinned," be-  
 the indulgent father did receive or clothe him; and this is  
 ding to the rule in the civil law; "*Si uxor quæ (culpa*  
*æ) recefferat, pœnitentiâ ducta ad virum rediens nolit admitti*  
*n, extunc culpa purgatur, in virum transfundit. tenebiturque*  
*û seorsum habitanti alimenta præstare."* So that the wife  
 t to be a penitentiary before the husband is bound to receive  
 or give her any maintenance: and no such thing appears  
 found in the verdict in our case. It is said by my brother  
 SDEN, "although the wife depart from her husband, yet  
 e continues his wife, and she ought not to starve." If a  
 an be of so haughty a stomach that she will choose to starve  
 r than submit, and be reconciled to her husband, let her  
 her own choice: the law is in no default, which doth not  
 ide for such a wife. If a man be taken in execution and  
 prison for debt, neither the plaintiff at whose suit he is ar-  
 d, nor the sheriff who took him, is bound to find him  
 ; drink, or clothes (a); but he must live on his own, or on  
 charity of others: and if no man will relieve him, let him  
 n the name of God, says the law (b); and so say I. If a  
 an, who can have no goods of her own to live on, will de-  
 from her husband against his will, and will not submit her-  
 o him, let her live on charity, or starve in the name of God;  
 n such case the law says, her evil demeanour has brought it  
 n herself, and her death ought to be imputed to her own wil-  
 ss. As to my brother TYRRELL's objection, it were  
 ige if our law, which gives relief in all cases, should send a  
 an unto another law or court to seek remedy to have  
 tenance. I answer, It is not sending the wife to an-  
 r law, but leaving the case to its proper jurisdiction; the

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Co. Lit. 295.

(a) See the Lords Act.

(b) Dive and Manningham's Case, Plowd. 68.

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case being of ecclesiastical consufance. Is it \* any strangeness or disparagement to the common pleas, to send a cut-purse or other felon taken in the court, to the king's bench to be indicted? or to the king's bench, to send a woman to the common-pleas to recover her dower? Why is it more strange for the common-law to send a woman to the ordinary to determine differences betwixt her and her husband touching matters of matrimony, than for our courts at common law to write to the ordinary to certify *marriage*, *bastardy*, or the like, where issue is joined on these points in the king's courts? for although the proceeding and process in the ecclesiastical courts are in the names of the bishops, yet these courts are the king's courts, and the law by which they proceed is the king's law (a): But the reason in both cases is, *quia hujusmodi causæ cognitio ad forum spectat ecclesiasticum* (b). According to that of *Bracton* (c), and *Stauford* (d), *sunt casus spirituales in quibus iudex secularis non habet cognitionem neque executionem, quia non habet coercionem: In his enim casibus spectat cognitio ad iudices ecclesiasticos qui regunt et defendunt sacerdotium.*" And hereunto agrees *Cawdrie's Case* (e). As in temporal causes the king by the mouth of his judges in his courts of justice determines them by the temporal law, so in causes ecclesiastical and spiritual (the consufance whereof belongs not to the common law) they are decided and determined by the ecclesiastical judges, according to the king's ecclesiastical laws; and that causes of matrimony, and the differences between husband and wife touching *alimony*, or maintenance for the wife (which are dependant upon, or incident to matrimony) are all of ecclesiastical, and not of secular consufance, is evident by the Books and authorities of our laws: "*De causâ testamentariâ sicut nec de causâ matrimoniali, curia regia se non intromittat, sed in foro ecclesiastico debet placitum terminari.*" All causes testamentary, and causes of matrimony, by the laws and customs of the realm, do belong to the spiritual jurisdiction. The words of the writ of prohibition granted in such cases are, "*Placita de tallis, et debitis quæ sunt de testamento vel matrimonio, spectant ad forum ecclesiasticum.*" In a suit commenced by a woman against her husband before the commissioners for ecclesiastical causes for alimony, a prohibition \* was prayed and granted, because it is a suit properly to be brought and prosecuted before the ordinary. In which if the party find himself grieved, he may have relief by appeal unto the superior court; and that he cannot have upon a sentence given in the high-commission court. But it is objected by my brothers *TYRRELL* and *TWISDEN*, that the remedy in the ecclesiastical court is not sufficient; for if the husband will not obey the sentence of the ordinary, it is but excommunication for his contumacy, and that will neither feed nor clothe the wife. Are the censures of the holy mother THE

Bracton, bk. 2.  
c. 20. fo. 7.

See the statute  
24. Hen. 8. c. 2.

\* [ 134 ]

See *Drake's Case*,  
Cro. Car. 220.

(a) *Cawdrie's Case*, 5. Co. 39.  
(b) *Year-Book*, 30. Hen. 6. Old  
Bk. Ent. 288.

(c) Bk. 3. fo. 107.  
(d) *Folin* 57.  
(e) 5. Co. 9.

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CHURCH grown of so little account with us, or the separation à communione fidelium become so contemptible, as to be slighted with but excommunication? Hath our law provided any remedy so penal, or can it give any judgment so fearful as this? With us the rule is, *Committitur Marefcal. or, Prison. de Fleet.* There the sentence is, *Traditur Satanae.* Which judgment is more penal? Take him *Gaoler*, till he pay THE DEBT: or, Take him *Devil*, till he obey THE CHURCH. And yet their judgment is warranted by the rule of ST. PAUL (a), "Whom I have delivered unto Satan;" whereupon the Comment says, "*anathema ab ipso Christi corpore (quod est ecclesia) recidis (b).*" "*Trudam;*" and also, "*nullus cum excommunicatis in oratione, aut cibo, aut potu, aut esculo communicet, nec ave eis dicat (c).*" As much is said by our law, and it is to the same effect: "*Excommunicato interdicitur omnis actus legitimus, ita quod agere non potest, nec aliquem convenire cum ipso, nec orare, nec loqui, nec palam nec absconditè vefci licet.*" THE SECOND GROUND of the law of excommunication is the law of England; and it is a ground in the law of England, that he who is accursed shall not maintain any action (d). Where a man is excommunicated by the law of the Church, if he sue any action, real or personal, the tenant or defendant may plead, that he is excommunicated, and demand judgment, if he shall be answered (e). The sentence is set forth at large in the old statute-book of MAGNA CHARTA, and is entitled, "*Sententia lata super Chartas,*" NAMELY, "*Autoritate Dei Patris Omnipotentis, et Filii, et Spiritus Sancti excommunicamus, anathematizamus, et à liminibus Sanctæ Matri. Ecclesiæ sequestramus omnes illos, &c (f).*" He who, by the renunciation, is rightfully cut off from the unity of the Church, and excommunicated, ought to be taken by the whole multitude as a heathen and a publican, until he be openly reconciled by penance (g). And this is grounded on the rule of our Blessed Saviour, "*Dic Ecclesiæ;*" and, "If he neglect to hear the Church, let him be as an heathen and publican (h)." Shall a man be accursed, barred of the company or society of Christians, cut off from the body of Christ, accounted as a heathen and publican, or not allowing maintenance to his wife, when the Church enjoins him so to do; and shall not this be accounted a sufficient remedy for the wife? I fear it is the want of religion, and due reverence to the censures of the Church, which occasions this objection, rather than real want of sufficient remedy in law for her relief.

\* [ 135 ]

THE LAST MATTER to be answered, is rather the opinion of my brothers TWISDEN and TYRRELL in their arguments, than an objection in this case; namely, if an action upon the case doth not lie against the husband upon the contract of the wife for necessary

(a) 1. Ep. Cor. ch. vth, ver. 5.  
(b) Causa 3. quest. 4. Cam. Egell.  
(c) Causa 2. qu. 3. can. excom.  
TRACTON, bk. 4. c. 23. f. 42.  
(d) Dr. & 11.

(e) Lit. 201.  
(f) 12. Hen. 3. pl. 146.  
(g) Acts, ch. 33. confirmed by the  
Statute 13. Eliz. c.  
(h) St. Math. c. xviii. ver. 17.

apparel,

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Vide 1. Lev. 51.  
1. Keb. 194.  
and 637.

\* [ 136 ]

Co. Lit. 283. a.  
1. Sur. 651.

apparel, yet an action of *trover and conversion* doth lie against him for the stuff; and so one way or other the husband must pay the reckoning. If the law should be so, it were a conversion with a witness; for then the husband should seem to be *sub potestate fæminæ*: he might glory in the words of ST. PAUL, "I would have you know, that the head of the woman is the man." But if the wife shall set his cap, or lay his headship in the gaol, it shall not be in the power of the husband to prevent or avoid it. One kind of divorce between husband and wife is, when action of trespass is brought against them, and the husband only appears, and process issues out against the wife; until she be waived and outlawed she can never purchase her pardon, or reverse the outlawry, unless the husband will appear; so that if the husband please he is divorced (a). If the wife be outlawed by erroneous process, and the husband will not bring a writ of error, he may by this way be rid of a shrew, and that doth countervail a divorce (b). By these Books it appears, that the law puts a power in the husband to be rid of his wife, and provides a remedy to tame a shrew; but I never heard before, that the law hath left it in the power of the wife to do so by her husband; and \* I do not remember that my brothers did vouch any authority, or give any reason for maintenance of their opinions; and therefore I may with freedom deny the law to be as they have said. Besides, the nature of an action of *trover* proves that it lies not in this case. The count is, That the plaintiff was *possessed* of such goods (and names them) as of his own proper goods, and casually *lost* them; that the goods came to the defendant's hands by *findings*, yet he, knowing them to belong to the plaintiff, refuseth to deliver them to him, but hath *converted* them to his own use; so that an action is grounded upon a *wrong* supposed to be done by the defendant, in converting the goods of the plaintiff knowingly to his own use, against the will of the plaintiff: and that is the reason why the plaintiff in that action must prove a demand of the goods, and an actual conversion by the defendant, or else he fails in the action. In an action on the case, for that the defendant did find the goods of the plaintiff, and delivered them to persons unknown, "*non deliberavit modo et for- mæ*" is no plea, without saying "*not guilty*," where the thing rests in seafance. And if the action be, That the plaintiff was possessed *ut de bonis propriis*, and the defendant did find and convert them to his own use; it is no plea, that the plaintiff was not possessed *ut de bonis propriis*, but he must plead "*not guilty*" to the misdemeanor, and give the other matter in evidence. In *TROVER* the plaintiff declares, that he was possessed of such goods, and casually lost them, and the defendant found them, and converted them to his own use; the defendant pleaded that the plaintiff gaged the goods to him for ten pounds, and that he detained the goods for ten pounds: this is no plea; but he ought to plead "*not guilty*," and give this matter in evidence; for the action supposeth a *wrong*,

(a) 14. Hen. 6. pl. 14. 2.

(b) 15. Edw. 4. pl. 4. 2. 12. Mod. 444.

which

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which the defendant ought to answer. But what wrong is done to the plaintiff in our case, when he himself sells and delivers the goods? It is not unlike the case where two men, by mutual consent, wrestle or play at foot-ball together; will *an action* of assault and battery lie for the one against the other, when the act is one by their mutual agreement beforehand? Put the case of sale made to a man upon credit, where the vendee promises to pay for the goods at *Michaelmas*, but fails to pay the money accordingly, shall the salesman have trover against the vendee, because he pays not the money at the day? And will the sale to his *feme covert* alter the case, or the law, as to the action? It is true, that for a conversion by the woman before coverture, or by the wife during the coverture, an action of trover lies against the husband and wife; but this is for a conversion by wrong, when she takes the goods, and converts them against the will of the owner (a). As in case where a man comes to buy goods, and offers ten pounds for them, and the owner agrees to accept the money, whereupon the buyer takes the goods away without payment or delivery by the owner; there an action of trespass or trover lies, notwithstanding the bargain: otherwise it is, if they agree upon a price, and the vendor take the vendee's word for payment, and deliver the goods to him; there the vendor is put to his action for the money upon the contract, and shall not bring trover for the goods. If *an infant* give or sell goods, and deliver them with his own hand, he shall have no action of trespass against the donee or vendee, by reason of the delivery (b): but if an infant give or sell goods, and the vendee or donee take them by force of the gift or sale, the infant may have an action of trespass against him. So in our case: if a *feme covert* take wares of a shop-keeper, against his will, upon pretence of buying them, an action lies against the husband; but if the owner sell the goods to the wife upon trust, and deliver the goods to her, he shall not have an action of trespass against the husband by reason of this livery. If a man take my wife and clothe her, this amounts to gift of the apparel to her; and I may take my wife with the apparel, and no action lies against me: by the same reason when a man delivers stuff, or other wares to my wife, knowing her to be *feme covert*, to make apparel, without my privity or allowance, this shall be construed to be a gift of the stuff to her, and I shall not be charged in any action for it: besides, consider the inconveniencies which will follow, if an action of trover should be brought against the husband; for then the husband shall be barred of all those helps which my brothers (who maintain that opinion) have owed to him, and have made reasons for which an action of the

\* [ 137 ]

21. Hen. 7.  
pl. 6.

14. Hen. 8.  
pl. 22.

Cro. Car. 344.  
Finch, 22.  
11. Hen. 4.  
pl. 83.

(a) Remis and Humfrey's Case, 3. b. 295.

(b) 21. Hen. 7. pl. 37. 26. Hen. 8. 2. Hob. 77. 2. Roll. Rep. 408.

Latch, 10. 3. Mod. 310. Ante, 251.  
Perkins, 22. 19. 3. Bac. Abr. 139,  
140. 3. Burr. 1794.

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2. Salk. 118.

case should lie \* against him on the contract ; namely, the jurors are to examine and set the price or value, and the necessity and fitness of things, with relation to the degree of the husband, whereby care is taken, that the husband have no wrong ; for in an action of trover the jury cannot examine any of those matters, but are to enquire only of *the property* of the *plaintiff*, and *the conversion* by the *defendant*, and to give damages according to *the value* of the goods : and so it shall be in the power of the wife to take up what she pleaseth, and to have what she lists, without reference to the degree, or respect to the estate of her husband, and he shall be charged with it *nolens volens*. It is objected, that the jury is to judge what is fit for the wife's degree, that they are trusted with the reasonableness of the price, and are to examine the value ; and also the necessity of the things or apparel. Alas, poor man ! what a judicature is set up here to decide the private difference between husband and wife ? The wife will have a velvet gown, and a sattin petticoat, and the husband thinks mohair, or farendon for a gown, and watered tabby for a petticoat is as fashionable, and fitter for his quality. The husband says, that a plain lawn gorget of ten shillings pleaseth him, and suits best with his condition ; the wife will have a Flanders lace, or point handkerchief of forty pounds, and takes it up at THE EXCHANGE. A jury of mercers, silkmen, sempsters, and exchange-men, are very excellent and very indifferent judges to decide this controversy : it is not for their avail and support to be against the wife, that they may put off their braided wares to the wife upon trust, at their own price, and then sue the husband for the money. Are not a jury of drapers and milliners bound to favour the mercer or exchange-men to-day, that they may do the like for them to-morrow ? And besides, What matter of fact (and of that only the law hath made jurors the judges) is there in the fitness of the commodities with reference to the degree of the husband ? and, Whether this or that thing be the most necessary for the wife ? The matter of fact is, to find, that the wife wanted necessary apparel, and that she bought such and such wares of the plaintiff, at such a price, to clothe herself ; and leaves the fitness of the one, and the reasonableness of the other, to the Court ; for that is matter of law, whereof the jurors have no consuance. Lessee for life of a house

\* [ 139 ] puts his \* goods therein, makes his executors, and dies ; who-soever hath the house after his death, yet his executors shall have free entry, egress and regress to carry their testator's goods out of the house by reasonable time (a). And this reasonable time shall be adjudged by the discretion of the Justices before whom the cause depends, upon the true state of the matter, and not by the jury (b). So it is in case of fines for admittance, customs, and services, if the question be, Whether the same be reasonable, or

(a) Litt. 69. 11. Co. 44.

(b) Go. Lit. 56. b. See also ante, page 27. case 73. note (a).

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not? For reasonableness belongs to the knowledge of the law. A lessee for life makes a lease for years, and dies within the term; in an action of trespass, brought by the first lessor against the lessee for years, he ought by his plea to set forth what day his lessor died, and at what place, where the land lies, and at what day he did leave the possession; and so leave it to the discretion of the Court, Whether he did quit the possession in reasonable time, or not? The fitness or necessity of apparel, and the reasonableness of the price, shall be judged by the Court, upon the circumstance of the matter, as the same appears by the pleadings, or is found by the jury; but the jurors are not judges thereof. Again, there is a twofold necessity, *necessitas simplex, vel absoluta, and necessitas qualificata, vel convenientiæ*. Of a simple and absolute necessity, in the case of apparel or food for a *fine covert*, the law of the land takes notice, and provides remedy for the wife, if the husband refuse or neglect to do it. But if it be only *necessitas convenientiæ*, whether this or that apparel, this or that meat or drink, be most necessary or convenient for any wife, the law makes no person judge thereof but the husband himself; and in those cases no man is to put his hand between the bone and the flesh. I will conclude the general question, or first point, with the judgment of *Sir Thomas Smith*, in his book of the Commonwealth of *England*: "The naturalest and first conjunction of two towards the making a further society of continuance, is of the husband and wife, each having care of the family: the man to get, to travel abroad, to defend; the wife to save, to stay at home, and distribute that which is gotten for the nurture of the children and family; is the first and most natural but priuate apparence of one of the best kind of commonwealths, where not one always, but sometimes, and in some things, another bears \* rule; which to maintain, God hath given the man greater wit, better strength, better courage to compel the woman to obey, by reason or force; and to the woman, beauty, fair countenance, and sweet words to make the man obey her again for love. Thus each obeyeth and commandeth the other, and they two together rule the house, so long as they remain together in one." I wish, with all my heart, that the women of this age would learn thus to obey, and thus to command their husbands: so will they want for nothing that is fit, and these kind of flesh-flies shall not suck up or devour their husbands estates by illegal tricks.

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Hubart's Case,  
4. Co. 27.

Soiner's Case, in  
the Year-Book  
22. Edw. 4.  
pl. 18.

Brook 1. cap. 11.  
fol. 23.

\* [ 140 ]

I am come now to this particular case, as it stands before us on this record. Admit that the husband were chargeable by law by the contract of his wife, yet judgment ought to be given against the plaintiff, upon this declaration, as this verdict is found. FIRST, The declaration is, that the defendant was indebted to the plaintiff in ninety pounds, for wares and merchandizes by the plaintiff to him before that time sold and delivered; and the verdict finds, that the wares were not sold and delivered to the defendant, but the

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Darcy v. De-  
nier, Yelv. 106.

\* [ 141 ] \*

same were sold to his wife without his privity or consent. So it appears, that the plaintiff hath mistaken his action upon the case for wares sold to him, and ought to have declared specially, according to the truth of his case, for wares sold to his wife for necessary apparel. In an action of battery against the husband and wife, the plaintiff counted, that they both did assault and beat him. Upon not guilty pleaded, the jury found, that the wife alone did make the assault, and not the husband: and the verdict was against the plaintiff, because now the plaintiff's action appeared to be false; for the husband ought not to be joined, but for conformity; and there is a special action for the plaintiff in that case: so this verdict is against the case, because it appears, that the action brought by him is false, and that he ought to have brought another action upon the special matter of his case, if any such law lie for him. **SECONDLY**, The jury find, that the defendant's wife departed from him against his will, and lived from him; and that the defendant, before the wares were sold to his wife, did forbid the plaintiff to trust his wife with any wares; and that the plaintiff, contrary to his prohibition, did sell and deliver those wares to the wife upon credit: and I conceive, that this prohibition doth so far bar or bind the plaintiff, that he shall never have any action against the defendant for wares sold and delivered to his wife, after he was prohibited by the husband. It is agreed by all, that a *feme covert* cannot generally make any contract which shall charge or discharge her husband, without the authority or consent of the husband, precedent or subsequent; so that the authority or consent of the husband is the foundation or ground which makes the contract good against him: but when the husband forbids a particular person to trust his wife, this prohibition is an absolute revocation or countermand, as to the person, of the general authority which the wife had before, and puts him in the same plight as if the wife had never any authority given her. It is said by my brothers **TWISDEN** and **TYRRELL**, that the prohibition of the husband is void; for (says **TYRRELL**) the husband is bound to maintain his wife, notwithstanding her departure from him, and therefore he cannot prohibit others to do it.—And **TWISDEN** says, It is a right vested in her by the law, and therefore the prohibition of the husband shall not divest, or take it away from her.—I have already answered and disproved these reasons, on which they ground their opinions, and will not repeat them here again; but admit that the husband were by law bound to maintain his wife, notwithstanding her departure from him against his will; and that the law doth give her, or vest a right in the wife to bind or charge the husband by her contract for necessary apparel; will this be a good consequence thereupon, Therefore the husband cannot forbid this or that particular person to trust his wife? A man makes a feoffment in fee, upon condition that the feoffee shall not alien; this condition is void. Were it not a strange conclusion to say thereupon, If a man make a feoffment

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it in fee, upon condition that the feoffee shall not alien to *J. S.*  
 : this condition is likewise void? The reason given by *Little-*  
 why the condition is void in the former, and not in the latter  
 : of this second \* case, is applicable to our case; namely, The  
 dition in the first case ousts the feoffee of all the power which  
 law gives to him, which should be against reason, and there-  
 : the same is void; but in the latter case the condition doth  
 take away all the power of aliening from the feoffee, and  
 efore it is good: So in our case, if the prohibition were so ge-  
 al, that the wife were thereby disabled altogether to clothe  
 self, peradventure it might be reasonable to say, that the prohi-  
 on was void; but it being a restriction only to one particular  
 son, there is no colour to say, that it is not good. It is true, *1. Salk. 118.*  
 ny BROTHER TYRRELL says, that I cannot discharge others to  
 with my wife, although I may forbid my wife to deal with  
 n; but it follows not thereupon, but that my prohibition to a  
 ticular person doth make his dealing with, or trusting my wife,  
 e at his own peril, so that he shall not charge me thereby in an  
 on; as in case of a servant, who buys provision for my house-  
 d by my allowance: if I forbid a butcher, or other victualler,  
 ell to my servant without ready money, and he deliver meat to  
 servant afterwards upon trust, it is at his peril; he shall have  
 action against me for it. It appears not by this declaration or  
 list, that the defendant's wife did want apparel, that she ever  
 red her husband to supply her therewith, that he refused to al-  
 her what was fit, that the wares sold to her by the plaintiff  
 e for necessary apparel, or of what nature or price the wares  
 e; so that the Court may judge of the necessity or fitness  
 eof: but only, that the plaintiff did sell and deliver upon cre-  
 ditors of the wares mentioned in the declaration unto the  
 : (whereas none are mentioned therein) for forty-three pounds;  
 : this was a reasonable price for these wares, and the same  
 es were necessary for her, and suitable to the degree of her  
 band; and for these reasons the defendant ought to have judg-  
 nt in this particular case against the plaintiff, be the law what  
 vill in general. I will conclude all, as the seven princes of *Esther, cap. 8.*  
 sia (who knew law and judgment) did, in the case of *Queen* *verse 16, &c.*  
*thi*, "This deed that this woman \* hath done in departing  
 rom her husband against his will, and taking of clothes upon  
 rust, contrary to his prohibition, shall come abroad to all wo-  
 nen; and if it shall be repeated that her husband (by the opi-  
 ion of the Judges) must pay for the wares which she so took  
 p whilst she lived from him, then shall their husbands be de-  
 ified in their eyes. But when it shall be known throughout  
 ne realm, That the law doth not charge the husband in this  
 ase, all the wives shall give to their husbands honour, both  
 reat and small."

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Judgment for the defendant, TYRRELL, TWISDEN and  
MALLET dissenting (a).

(a) But although a *feme covert* is by the general rule of law incapable, during the coverture, of binding either herself or her husband, by her assent, to any agreement, 1. Sid. 120. 4. Leach. 42. 1. Salk. 118. yet there are several exceptions under which she may both in law and equity make such contracts as will be binding on herself, and entitle her to sue, or subject her to be sued, as if she were a *feme sole*. FIRST, Where a wife has a separate property settled upon her previous to the marriage. Grigby v. Cox, 1. Vezey, 517. ; Allen v. Papworth, 1. Vezey, 163. ; Bell v. Hyde, Prec. Chan. 328. Gilb. Eq. Rep. 83. ; Paddock v. Monk, 2. Vezey, 193. ; Norton v. Turvil, 2. Peer. Wms. 144. ; Stanford v. Marshall, 2. Atk. 68. ; Freeman v. Mason, 2. Brown's Caf. Par. 378. ; Wright v. Cadogan, 6. Brown's Caf. Par. 156. ; Moseley's Case, 2. Vern. 225 ; Carter v. Strahan, Cowp. 201. Dougl. 53. SECONDLY, If her husband has abjured the realm, or is banished. The Year-Book 1. Hen. 4. pl. 1. 10. Edw. 3. pl. 37. JENK. Cent. 4. Moor, 851. Co. Lit. 133. 332. 1. Roll. Rep. 400. 2. Vern. 104. 1. Salk. 116. 1. Ld. Ray. 147. 1. Bac. Abr. 308. Cooke's Bank. Laws, 26. THIRDLY, By the custom

of London, as where a *feme covert* trades by herself in a trade with which her husband does not intermeddle. 10. Mod. 6. FOURTHLY, Where a wife lives separate from her husband, on a *separate maintenance* allowed her by her husband on separation after the marriage. Lean v. Schutz, 2. Bl. Rep. 1195. ; Ringstead v. Lady Lancashire, Cooke's Bank. Laws, 24. Powell on Contracts, 78. ; Barwell and Binoks, Co. Ban. Laws, 28. ; Corbet v. Polnitz, 1. Term Rep. 5. But see as to the doctrines of this last case, Powell on Contracts, 89. to 114. It is clear also, that a wife may, from an implied assent, bind her husband by her contracts for necessaries during cohabitation, 1. Sid. 120. provided the contract be not made under illegal circumstances, Fowler v. Dingley, 2. Stra. 1122. and no express prohibition be given to vendors of the goods, Salk. 118. ; but a wife can in no case render her husband liable for money borrowed, although it is actually employed in the purchase of necessaries. 1. Peer. Wms. 185. See also 3. Wulf. 583. Bull. N. P. 136. Salk. 119. Stra. 647-706. 2. Stra. 875. 1214. 1. Bl. Rep. 1070. 2. Brown's Rep. Chan. 377. 1. H. Bl. Rep. 334. 343.

TRINITY

# TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The King's Bench.

Friday, 15. June, 1677.

Sir Richard Rainsford, *Knt. Chief Justice,*

Sir Thomas Twifden, *Knt.*

Sir William Wyld, *Knt.*

Sir Thomas Jones, *Knt.*

} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

\* [ 144 ]

\* The Earl of Shaftsbury's Case.

Case 1.

**H**E was brought to the bar upon the return of an *habeas corpus*, directed to the constable of the Tower of London. The effect of the return was, That ANTHONY EARL OF SHAFTSBURY, in the writ mentioned, was committed by the house of lords "for a high contempt against the house," although the warrant do not express the nature of the contempt, nor the place where it was committed, nor the time when it was committed, nor whether it was on a conviction or accusation only; for this power of commitment is out of the privileges of the house, and therefore the Court hath no jurisdiction; but a person committed for a contempt by the order of either house of parliament may be discharged by the court of king's bench after a dissolution or prorogation of the parliament, whether he were committed during the session or afterwards; for all orders of parliament are determined by a dissolution or prorogation.—S. C. 1. Freem. 453. S. C. 3. Keb. 792. S. C. 2. State Tr. 612. 2. Show. 336. 12. Mod. 441. 564. 606. Fitzg. 111. 266. 1. Ld. Ray. 603. 2. Ld. Ray. 739. 1105. 3. Peer. Wms. 154. 2. Ld. Ray. 1105. 2. Bl. Rep. 757. 2. Hawkins' Pleas of the Crown, 6th edit. p. 170. in *notis*.

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THE EARL OF  
SHAFTSBURY'S  
CASE.

to the TOWER of London, 16. February 1676, by virtue of an order of the lords spiritual and temporal in parliament assembled. The tenor of which order followeth in these words : " Ordered " by the lords spiritual and temporal in Parliament assembled, that " the constable of his majesty's TOWER of London, his deputy " or deputies, shall receive the bodies of *James Earl of Salis-* " *bury, Anthony Earl of Shaftsbury, and Philip Lord Wharton,* " members of this house, and keep them in safe custody, within " the said TOWER, during his majesty's pleasure, and the pleasure " of this house, for their high contempt committed against this " house : and this shall be a sufficient warrant on that behalf."

To THE CONSTABLE, &c. JOHN BROWNE, *Cler' Parl'.*

The Earl of Shaftsbury's counsel prayed, that the return might be filed, and it was so ; and the Friday following was appointed for the debating of the sufficiency of the return. In the mean time, directions were given to his counsel, to attend the Judges and the attorney-general, with their exceptions to the return ; and my lord was remanded till that day : and it was said, that though the return was filed, the Court could remand or commit him to the marshal at their election.

On Friday the earl was brought into court again, and his counsel argued the insufficiency of the return.

WILLIAMS said, that this cause was of great consequence, in regard that the king was touched in his prerogative, the \* subject in his liberty, and this court in its jurisdiction.—FIRST, The cause of his commitment (which is returned) is not sufficient ; for the general allegation, of " high contempts," is too uncertain ; for the Court cannot judge of the contempt, if it doth not appear in what act it is. SECONDLY, It is not shewed where the contempt was committed ; and, in favour of liberty, it shall be intended it was committed out of the house of peers. THIRDLY, The time is uncertain ; so that, peradventure, it was before the last act of general pardon (a). FOURTHLY, It doth not appear whether this commitment was on a conviction, or an accusation only. It cannot be denied, but that the return of such commitment by any other court, would be too general and uncertain. In *Moore*, 839. it appears, that *Astwick* was bailed on a return, " *quod commissus fuit per mandatum NI. BACON, mil. domini custodis magni sigilli Angliæ, virtute cujusdam contempt. in curia cancellariæ fact.* ;" and in that book it appears, that divers other persons were bailed on such general returns ; and the cases have been lately affirmed in *Busbell's Case*, reported by VAUGHAN, *Chief Justice*, where it is expressly said, that on such commitment and return, being too general and uncertain, the Court cannot believe in an implicit manner, that in truth the commitment was for causes particular and sufficient (b). The commitment of the jurors was for

(a) See *Russell's Case*, 1. Roll. Abr. 192, 193. 219.

(b) Vide ante, 119. Post. 147. 184, 185. Vaugh. 14. 2. Inst. 52, 53, 55. 1. Roll. 218.

acquitting

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acquitting *Pen* and *Mead*, "*contra plenam et manifestam evidenciam*;" and it was resolved to be too general, for the evidence ought to appear as certain to the Judge of the return, as it appeared before the Judge authorized to commit (a). This commitment being by the house of peers will make no difference; for in all cases where a matter comes in judgment before this court, let the question be of what nature it will, the Court is obliged to declare the law, and that without distinction, whether the question began in parliament or no. In the case of *Sir — Binion* (b) in the common pleas, there was a long debate, Whether an original might be filed against a member of parliament during the time of privilege? And it was urged, that it being during the sessions of parliament, the determination of the question did belong to the parliament; but it was resolved, an original might be filed (c); and BRIDGMAN, \* then being Chief Justice, said, that the Court was obliged to declare the law, in all cases that come in judgment before them. In *Hilary Term*, 24. *Edw. 4. Roll.* 4. 7. and 10. in the *Exchequer*, in debt by *Rivers v. Cousin*, the defendant pleads, that he was a servant to a member of parliament, and *ideo capi seu arresti non debet*; and the plaintiff prays judgment; and *quia videtur baronibus quod tale habetur privilegium quod magnates, &c. et eorum familiares capi seu arrestari non debent; sed nullum habetur privilegium quod non debent implacitari: Ideo respondeat euster* (d). So in *Treyward's Case* (e), a question of privilege was determined in this court. In the 14. *Edw. 3.* in the case of *Sir John* and *Sir Geoffry Staunton* (which was cited in the case of the *Earl of Clarendon*, and is entered in the lords journals), an action of waste depended between them in the common pleas, and the Court was divided, and the record was certified into the house of parliament; and they gave direction that the judgment should be entered for the plaintiff; but afterwards, in a writ of error brought in this court, that judgment was reversed, notwithstanding the objection that it was given by order of the house of lords; for the court was obliged to proceed, according to the law, in a matter which was before them in point of judgment. The construction of all acts of parliament is given to the courts at *Westminster*; and accordingly they have adjudged of

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2. Show. 337.

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Stiles, 139.  
2. Show. 84.  
March. 92.  
Latch. 150.  
2. Stra. 1065.

(a) Russell's Case, 1. Roll. Abr. 192. 219.

(b) 1. Lev. 111. 1. Show. 99. 1. Pryn. Parl. Writs, 814, 815. 2. Salk. 512. Carth. 137. 2. Ld. Ray. 1113.

(c) And now by 12. & 13. Will. 3. c. 13. "Any member of the house of commons, or other person having privilege of parliament, may also be sued by original bill and summons, attachment, and distress infinite." 2. Ld. Ray. 1442. Cowp. 844. Tidd's Pract. 3. 81. See also 11. Geo. 2. c. 24. 4. Geo. 3. c. 33. and 10. Geo. 3. c. 50.

2. Stra. 985. Fort. 159. Comyns Rep. 444. 1. Black. Com. 165.

(d) But see an order of the house of peers, 24. May 1724, that this privilege is restrained to menial servants and others necessarily employed about the estates of peers; and by another order, of 22. Jan. 1715, every peer shall, upon his honour, certify to the house, that the persons protected are within the privilege of the house. See 2. Stra. 1065. 1. Will. 278. and the statute 10. Geo. 3. c. 50, by which this privilege seems to be taken away.

(e) Dyer, 60.

the

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the validity of acts of parliament; have searched the rolls of parliament (a); have determined whether the journals be a record (b); and, when a point comes before them in judgment, they are not foreclosed by any act of the lords (c). If it appear, that an act of parliament was made by the king and lords without the commons, that is *felode se*, and the courts of *Westminster* do adjudge it void (d); and accordingly they ought to do. If this return contain in it that which is fatal to itself, it must stand or fall thereby. It hath been a question often resolved in this court, When a writ of error in parliament shall be a *superfedeas*? And this Court hath determined what shall be said to be a session of parliament (e); and if the law were otherwise, there would be a failure of justice. If the parliament were dissolved, there can be no question, but the prisoner should be discharged on a *habeas corpus*; and yet then the Court must examine the cause of his commitment; and by consequence therefrom must examine a \* matter parliamentary: and the Court may now have cognizance of the matter as clearly as when the parliament is dissolved. The party would be without remedy for his liberty, if he could not find it here; for it is not sufficient for him to procure the lords to determine their pleasure for his imprisonment; for before his enlargement, he must obtain the pleasure of the king to be determined, and that ought to be in this court, and therefore the prisoner ought first to resort hither. Let us suppose (for it doth not appear on the return, and the Court ought not to enquire of any matter out of it) that a supposed contempt was, of a thing done out of the house, it would be hard for this Court to remand him. Suppose he were committed to a foreign prison during the pleasure of the lords, no doubt that would be an illegal commitment, against MAGNA CHARTA, and THE PETITION OF RIGHT. There the commitment had been expressly illegal; and it may be this commitment is no less: for if it had been expressly shewn, and he be remanded, he is committed by this Court, who are to answer for his imprisonment. But SECONDLY, The duration of the imprisonment, during the pleasure of the king and of the house, is illegal and uncertain; for since it ought to determine in two courts, it can have no certain period. A commitment "until he shall be discharged by the courts of king's bench and common pleas," is illegal; for the prisoner cannot apply himself in such manner as to obtain a discharge. If a man be committed "till further order," he is bailable presently; for that imports till he shall be delivered by due course of law; and if this commitment have not that sense, it is illegal; for the pleasure of the king is that which shall be determined according to law in his courts; as where the statute of *Westminster* 1. cap. 15. declares that he is repleviable who is taken by command of the king, it ought to extend to an extrajudicial command, not in his courts of justice, to which all matters of judicature are delegated and distributed.

2. Inst. 186, 18

(a) Lord Hudson's Case, 11cb. 109.

(b) Hob. 110.

(c) S. Co. 29. b.

(d) The Year-Book 4. Hen. 7. pl. 18. Hob. 111.

(e) 1. Koll. Rep. 29.

WALLOP

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WALLOP to the same purpose. He cited *Bushe's Case* (a), THE EARL OF SHAFTESBURY'S CASE. that the general return for "high contempts" was not sufficient; and the Court that made the commitment in this case makes no difference; for otherwise one may be \* imprisoned by the house of peers unjustly, for a matter relievable here, and yet shall be out of all relief by such a return; for upon a supposition that this Court ought not to meddle where the person is committed by the peers, then any person, at any time, and for any cause, is to be subject to perpetual imprisonment at the pleasure of the lords. But the law is otherwise; for though the house of lords is the supreme court, yet their jurisdiction is limited by the common and statute-law; and their excesses are examinable in this court; for there is great difference between the errors and the excesses of a court, between an erroneous proceeding, and a proceeding without jurisdiction, which is void, and a meer nullity. In the parliament, the king would have one attain of treason, and lose his land; and the lords assented, but nothing was said of the commons; wherefore all the Justices held that it was no act, and he was restored to his land; and without doubt, in the same case, if the party had been imprisoned, the Justices must have made the like resolution, that he ought to have been discharged. It is a solecism, that a man shall be imprisoned by a limited jurisdiction, and it shall not be examinable whether the cause were within their jurisdiction or no? If the lords without the commons should grant a tax, and one that refused to pay it should be imprisoned, the tax is void; but by a general commitment the party shall be remediless: so if the lords shall award a *capias* for treason or felony. By these instances it appears, that their jurisdiction was restrained by the common-law; and it is likewise restrained by divers acts of parliament. 1. *Hen. 4. cap. 14.* No appeals shall be made, or any way pursued in parliament. And when a statute is made, a power is implicitly given to this court by the fundamental constitution, which makes the Judges expositors of acts of parliament. And peradventure if all this case appeared upon the return, this might be a case in which they were restrained by the statute 4. *Hen. 8. cap. 8.* "That all suits, accusations, condemnations, punishments, corrections, &c. at any time from henceforth to be put or had upon any member for any bill, speaking or reasoning of any matters concerning the parliament to be communed or treated of, shall be utterly void and of none effect." \* Now it doth not appear but this is a correction or punishment imposed upon THE EARL contrary to the statute. There is no question made now in the power of the lords; but it is only urged, that it is necessary for them to declare by virtue of what power they proceed; otherwise the liberty of every ENGLISHMAN shall be subject to the lords, whereof they may deprive any of them against an act of parliament; but no usage can justify such a proceeding (b). *The Duke of Suffolk* was impeached by the commons of high treason and misdemea-

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See the YEAR-BOOK 4. Hen. 7. pl. 18.

\* [ 149 ]

(a) Vaugh. 137. 2. Jones, 13. (b) Ellesmere's Case of the Postnati, 3. Keb. 322. Ante, 119. 19.

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THE EARL OF NORFOLK; the lords were in doubt whether they would proceed on such general impeachment to imprison the Duke; and the advice of the Judges being demanded, and their resolutions given in the negative, the lords were satisfied: this case is mentioned with design to shew the respect given to the Judges, and that the Judges have determined the highest matters in parliament. At a conference between the lords and commons (a) concerning the rights and privileges of the subject, it was declared and agreed, That no freeman ought to be restrained or committed by command of the king or privy-council, or any other (in which the house of lords are included), unless some cause of the commitment, restraint, or detainer, be set forth for which by law he ought to be committed, &c. Now if the king (who is the head of the parliament) or his privy-council (which is the court of state) ought therefore to proceed in a legal manner, this solemn resolution ought to end all debates of this matter. It is true, that in *Russell's Case* (b) COKE is of opinion, that the privy-council may commit without shewing cause; but in his more mature age he was of another opinion: and accordingly the law is declared in THE PETITION OF RIGHT; and no inconvenience will ensue to the lords by making their warrants more certain.

9. Leon. 71.  
2. Leon. 175.

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SMITH argued to the same purpose, and said, that a judge cannot make a judgment unless the fact appear to him on a *habeas corpus*; the judge can only take notice of the fact returned. It is lawful for any subject that finds himself aggrieved by any sentence or judgment, to petition the king in an humble manner for redress; and where the subject is restrained of his liberty, the proper place for him to apply himself to, is this Court, which hath the supreme power as to this purpose over all other courts; and an *habeas corpus* issuing here, the king ought to have an account of his subjects (c): and also the commitment was by the lords; yet if it be illegal, this Court is obliged to discharge the prisoner as well as if he had been illegally imprisoned by any other court. The house of peers is an high court, but the king's bench hath ever been entrusted with the liberty of the subject, and if it were otherwise (in case of imprisonment by the peers) the power of the king were less absolute than that of the lords. It doth not appear but that this commitment was for breach of privilege; but nevertheless if it were so, this Court may give relief, as appears in *Sir — Binion's Case* (d) before cited; for the Court, which hath the power to judge what is privilege, hath also power to judge what is contempt against privilege: if the Judges may judge of an act of parliament, *à fortiori* they may judge of an order of the lords. In *Butler's Case* (e), where he in reversion brought an action of waste, and died before judgment, and his heir brought an action for the same waste; and

(a) 3. April, Car. 1.

(b) 1. Roll. 129.

(c) *Wetherly v. Wetherly*, 2. Ro. Ab. 69.

(d) 1. Lev. 111. 1. Show. 99.

Anti, page 145. note (b).

(e) 12. Edw. 1.

the

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the king and the lords determined that it did lie, and commanded the Judges to give judgment accordingly for the time to come; this is published as a statute by *Pulton* (a): but in *Ryley* (b) it appears, that it is only an order of the king and the lords, and that was the cause that the Judges conceived that they were not bound by it; but 39. *Edw. 3. pl. 13.* and ever since have adjudged the contrary. If it be admitted, that for breach of privilege the lords may commit, yet it ought to appear on the commitment that that was the cause; for otherwise that may be called a breach of privilege which is only a refusing to answer to an action, whereof the house of lords is restrained to hold plea by the statute 1. *Hen. 4. c. .* and for a contempt committed out of the house they cannot commit; for the word "appeal" in the statute extends to all misdemeanors, as it was resolved by all the Judges in the *Earl of Clarendon's Case* (c). If the imprisonment be not lawful, the Court ought not to remand to his wrongful imprisonment, for that would be an act of injustice to imprison him *de novo* (d). \* It doth not appear whether the contempt was a voluntary act, an omission, or an inadvertency, and he hath now suffered five months imprisonment: false imprisonment is not only where the commitment is unjust, but where the detainer is too long (e). In this case, if this Court cannot give remedy, peradventure the imprisonment shall be perpetual; for the king (as the law is now taken) may adjourn the parliament for ten or twenty years (f). But all this is upon supposition, that the session hath continuance; but I conceive, that by the king's giving his royal assent to several laws which have been enacted, the session is determined; and then the order for the imprisonment is also determined. It appears by *Brook*, tit. "*Parliament*," 36, that every session in which the king signs bills is a day of itself, and a session of itself. By 1. *Car. 1. c. 7.* a special act is made, that the giving of the royal assent to several bills shall not determine the session: it is true, that it is there said to be made for avoiding all doubts, but in the statute 16. *Car. 1. c. 1.* there is a proviso to the same purpose; and also in the 12. *Car. 2. c. 1.* By the opinion of *Coke* (g) the royal assent doth not determine a session; but the authorities on which he relies do not warrant his opinion: for FIRST, In the parliament roll (h) it appears, that the royal assent was given to the act for the reversal of the attainder of the members of parliament the same day that it was given to the other bills; and in the same year the same parliament assembled again; and then it is probable the members who had been attainted were present, and not before. The case in 1. *Rich. 2. n. 13.* is only a judgment in case of treason, by virtue

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The 16. Car. 1.  
c. 1. is repealed  
by 16. Car. 2.  
c. 1.  
See 1. Black,  
Comm. 155.

(a) Pulton's edit. of the Statutes from Magna Charta to Car. 2.

(b) Ryley's Placita Parliamentaria, page 93.

(c) 4 July, 1663. 2. St. Trials, 550.

(d) Vaugh. 156.

(e) 2. Inst. 53.

(f) But see the 4. Edw. 3. c. 14, the 36. Edw. 3. c. 10. the 16. Car. 2, c. 1. the 1. Will. & Mary, R. 2. c. 2, and the 6. Will. and Mary, c. 1.

(g) 4. Inst. 27.

(h) 1. Hen. 6. pl. 7.

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of a power reserved to them on the statute of 25. *Edw. 3.* (a), and is not an act of parliament. The aid is first entered on the roll (b), but upon condition that the king will grant their other petitions. The inference my LORD COKE makes, that the act for the attainder of *Queen Katherine*, 33. *Hen. 8.* c. 21. was passed before the determination of the session, is an error; for though she was executed during the session, yet it was on a judgment given against the queen by the commissioners of *oyer and terminer*, and the subsequent act was only an act of confirmation: but COKE ought to be excused, for all his notes and papers \* were taken from him; so that this book (c) did not receive his last hand: but it is observable, that he was one of the members of parliament when the special act was passed (d). And afterwards the parliament did proceed in that session only, where there was a precedent agreement betwixt the king and the houses. And so concluded, that the order is determined with the session, and that *the Earl of Shaftsbury* ought to be discharged.

AYRES argued to the same effect, and said, that the warrant is not sufficient; for it doth not appear that it was made by the jurisdiction that is exercised in the house of peers; for that is *coram rege in parlamento*; so that the king and the commons are present in supposition of law: and the writ of error in parliament is, "*Inspeculo recordo, nos de consilio, advisamento dominorum spiritual. et temporalium et commun. in parliament. præd. existen. &c.*" It would not be difficult to prove, that anciently the commons did assist there: and now it shall be intended, that they were present; for there can be no averment against the record. The lords do several acts as a distinct house; as the debating of bills, enquiring of franchises and privileges, &c. And the warrant in this case (being by the lords spiritual and temporal) cannot be intended otherwise, but it was done by them in their distinct capacity; and the commitment being during the pleasure of the king and of the house of peers, it is manifest, that the king is principal, and his pleasure ought to be determined in this court. If the lords should commit a great minister of state whose advice is necessary for the king and his realm, it cannot be imagined that the king should be without remedy for his subject, but that he may have him discharged by his writ out of this court. This present recess is not an ordinary adjournment; for it is entered in the journal, that the parliament shall not be assembled at the day of adjournment, but adjourned or prorogued till another day, if the king do not signify his pleasure by proclamation.—Some other exceptions were taken to the return.—FIRST, That no commitment is returned, but only a warrant to the constable of the Tower to receive him.—

(a) Roll. Abr. "Parliament,"  
7 Hen. 4. pl. 29.  
(b) 14. *Edw. 3.* pl. 7.

(c) 3. Inst.  
(d) 1. Car. 1. c. 7.

SECONDLY,

\* SECONDLY, the return does not answer the mandate of the writ; for it is to have the body of ANTHONY *Earl of Shaftsbury*; and the return is of the warrant for the imprisonment of ANTHONY ASHLY COOPER, *Earl of Shaftsbury*. THE EARL OF  
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MAYNARD, *Serjeant*, to maintain the return. The house of lords is the supreme court of the realm: it is true, this Court is superior to all courts of ordinary jurisdiction. If this commitment had been by any inferior court, it could not have been maintained: but the commitment is by a court that is not under the controul of this court, and that court is in law sitting at this time; and so the expressing of the contempt particularly is matter which continues in the deliberation of the court. It is true, this Court ought to determine what the law is in every case that comes before them; and in this case the question is only, Whether this Court can judge of a contempt committed in parliament during the same session of parliament, and discharge one committed for such contempt? When a question arises in an action depending in this court, the Court may determine it: but now the question is, Whether the lords have capacity to determine their own privileges? and, Whether this Court can controul their determination, and discharge (during the session) a peer committed for contempt? The Judges have often demanded what the law is, and how a statute should be expounded, of the lords in parliament, as in the statute of Amendments, 40. *Edw. 3.* 84. 6. 8. *Co. 157, 158.*: *à fortiori*, the Court ought to demand their opinion when a doubt arises, on an order made by the house of lords now sitting. As to the duration of the imprisonment, doubtless the pleasure of the king is to be determined in the same court where judgment was given. As also to the determination of the session, the opinion of Coke is good law; and the addition of *provisoes* in many acts of parliament, is only in *majorem cautelam*.

JONES, *Attorney General*, to the same effect. As to the uncertainty of the commitment, it is to be considered, That this case differs from all other cases in two circumstances: FIRST, The person, that is a member of the house by which \*he is committed. I take it upon me to say, that the case would be different if the person committed were not a peer.—SECONDLY, The Court which doth commit; which is a superior court to this court; and therefore, if the contempt had been particularly shewn, of what judgment soever this Court would have been as to that contempt, yet they could not have discharged the earl, and thereby take upon them a jurisdiction over the house of peers. The Judges in no age have taken upon them the judgment of what is *lex et consuetudo parliamenti*; but here the attempt is to engage the Judges to give their opinion in a matter whereof they might have refused to have given it, if it had been demanded in parliament. This is true, if an action be brought where privilege is pleaded, the Court ought to judge of it as an incident to the suit, whereof the Court was possessed; but that will be no warrant for this Court to assume a judgment of an original matter arising in parliament. \* [ 154 ]

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And that which is said of the Judges power to imprison statutes, cannot be denied; but it is not applicable to this case. By the same reason that this commitment is questioned, every commitment of the house of commons may be likewise questioned in this court.—It is objected, That there will be a failure of justice if the Court should not discharge the earl; but the contrary is true, for if he be discharged there would be a manifest failure of justice; for offences of parliament cannot be punished anywhere but in parliament; and therefore the earl would be delivered from all manner of punishment for his offence, if he be discharged (for the Court cannot take bail, but where they have a jurisdiction of the matter), and so delivered out of the hands of the lords, who only have power to punish him.—It is objected, that the contempt is not said to be committed in the house of peers; but it may well be intended to be committed there; for it appears he is a member of that house, and that the contempt was against the house. And besides, there are contempts whereof they have cognizance, though they are committed out of the house.—It is objected, That it is possible this contempt was committed before the general pardon; but surely such injustice should not be supposed in the supreme court; and it may well be supposed to be committed during the session, in which the commitment to prison was. It would be a great difficulty for the lords to make their commitments so exact and particular, when they are employed in the various affairs of the realm: and it hath been adjudged on a return out of the chancery, of a commitment for a contempt against a decree, that it was good, and the decree was not shewn.—The limitation of the imprisonment is well; for if the king, or the house, determine their pleasure, he shall be discharged; for then it is not the pleasure of both that he should be detained; and the addition of these words “during the pleasure” is no more than was before implied by the law: for if these words had been omitted, yet the king might have pardoned the contempt, if he would have expressed his pleasure under the broad seal. If judgment be given in this court, That one should be imprisoned during the king’s pleasure, his pleasure ought to be determined by pardon, and not by any act of this court. So that the king would have no prejudice by the imprisonment of a great minister, because he could discharge him by a pardon: the double limitation is for the benefit of the prisoner, who ought not to complain of the duration of the imprisonment, since he hath neglected to make application for his discharge in the ordinary way. I confess, by the determination of the session, the orders made the same session are discharged; but I shall not affirm, whether this present order be discharged or no, because it is a judgment: but this is not the present case; for the session continues notwithstanding the royal assent given to several bills, according to the opinion of COKE; and of all the Judges. Every proviso in an act of parliament is not a determination what the law was before; for they are often added for the satisfaction of those that are ignorant of the law.

Hutton, 61, 62.

“ WINNINGTON,

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WINNINGTON, *Solicitor General*, to the same purpose. In the great case of *Mr. Seiden* (a), the warrant was "for notable attempts committed against us and our government, and stirring up sedition;" and though that be almost as general as in our case, yet no objection was made in that cause in any of the arguments. But I agree, that this return could not have been maintained, if it were of an inferior court; but during the session, this court can take no cognizance of the matter: \* and the inconveniency would be great, if the law were otherwise taken, for this court might adjudge one way, and the house of peers another way; which doubtless would not be for the advantage or liberty of the subject. For the avoiding of this mischief, it was agreed by this whole Court, in the case of *Barnadiston v. Soames* (b), that the action, for the double return, could not be brought in this court, before the parliament had determined the right of the election, lest there should be a difference between the judgments of the two courts. When a judgment of the lords comes into this court (though it be of the reversal of a judgment of this court), this court is obliged to execute it; but the judgment was never examined or corrected here. In the case of my *Lord Hollis* (c) it was resolved, that this court hath no jurisdiction of a misdemeanor committed in the parliament; when the parliament is determined, the Judges are expositors of the acts, and are intrusted with the lives, liberties, and fortunes of the subjects: and (if the session were determined) the earl might apply himself to this court; for the subject shall not be without place where he may resort for the recovery of his liberty; but this session is not determined. For the most part the royal assent is given the last day of parliament; as *Plowden* saith, in *Partridge's Case* (d): yet the giving of the royal assent doth not make it the last day of the parliament, without a subsequent dissolution or prorogation. And the Court judicially takes notice of prorogations or adjournments of parliament: *Cro. Jac.* 111. *Ford v. Hunter*: and by consequence, by the last adjournment, no order is discontinued, but remains as if the parliament were actually assembled: *Cro. Jac.* 242. *Sir Charles Heydon's Case*: so that the earl ought to apply himself to the lords, who are his proper judges. It ought to be observed, that these attempts are *primæ impressiōis*; and though imprisonments for contempts have been frequent, by the one or the other house, till now no person ever sought enlargement here. The Court was obliged in justice to grant the *habeas corpus*; but when, the whole matter being disclosed, it appears upon the return, that the case belongs *ad aliud examen*, they ought to remand the party. As to the limitation of the imprisonment, the king may determine his pleasure by pardon under the great seal, or \* warrant for his discharge under the privy seal, as in the case of *Reniger v. Fogassa*, *Plow.* 20.—As to the exception, that no commitment is returned, the constable can only shew what concerns himself, which is the

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(a) *Rush. Coll.* 18, 19. in the Appendix. 586. 664. 7. St. Tr. 428. 1. *Frcem.* 380. 387. 390.

(b) 2. *Lev.* 114. *Pollexfen* 470. (c) 1. St. Tr. 372. 7. St. Tr. 242.

3. *Keb.* 365. 369. 419. 428. 439. 442. (d) *Plowd.* 78. *Dyer*, 74.

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THE COURT delivered their opinion as follows :

SIR THOMAS JONES, *Justice*, said, Such a return, made by an ordinary court of justice, would have been ill and uncertain; but the case is different when it comes from this high court, to which so great respect hath been paid by our predecessors, that they deferred the determination of doubts conceived in an act of parliament, until they had received the advice of the lords in parliament. But now, instead thereof, it is demanded of us to controul the judgment of all the peers given on a member of their own house, and during the continuance of the session. The cases where the courts of *Westminster* have taken cognizance of privilege, differ from this case; for in those it was only an incident to a case before them, which was of their cognizance; but the direct point of the matter now is the judgment of the lords. The course of all courts ought to be considered; for that is the law of the court: *Lane's Case*, 2. Co. 16. And it hath not been affirmed, that the usage of the house of lords hath been to express the matter more punctually on commitments for contempts; and therefore I shall take it to be according to the course of parliament. 4 *Inst.* 50. it is said, that the Judges are assistants to the Lords, to inform them of the common law; but they ought not to judge of any law, custom, or usage of parliament. The objection, as to the continuance of the imprisonment, hath received a plain answer; for it shall be determined by the pleasure of the king, or of the lords; and if it were otherwise, yet the king could pardon the contempt under THE GREAT SEAL, or discharge the imprisonment under THE PRIVY SEAL. I shall not say what would be the consequence (as to this imprisonment) if the session were determined, for \* that is not the present case; but as the case is, this court can neither bail nor discharge the earl.

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WYLDE, *Justice*. The return, no doubt, is illegal; but the question is on a point of jurisdiction, Whether it may be examined here? This court cannot intermeddle with the transactions of the high court of peers in parliament, during the session, which is not determined; and therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the session had been determined, I should be of opinion that he ought to be discharged.

See 2. Show.  
335. to 338.

RAINSFORD, *Chief Justice*. This court hath no jurisdiction of the cause, and therefore the form of the return is not considerable. We ought not to extend our jurisdiction beyond its due limits, and the actions of our predecessors will not warrant us in such attempts: the consequence would be very mischievous, if this court should

Trinity Term, 29. Car. 2. In B. R.

should deliver the members of the houses of peers and commons who are committed. The business of parliament may be thereby retarded; for perhaps the commitment was for evil behaviour, or indecent reflections on the members, to the disturbance of the affairs of parliament. The commitment, in this case, is not for *safe custody*, but he is in *execution* on the judgment given by the lords for the contempt; and therefore if he be bailed, he will be delivered out of execution; because for a contempt *in facie curiæ*, there is no other judgment or execution. This court hath no jurisdiction of the matter, and therefore he ought to be remanded. I deliver no opinion, if it would be otherwise in case of prorogation.

THE EARL OF  
SHAFTSBURY'S  
CASE.

1. Ld. Ray. 18.

Skin. 56.

2. Hawk. P. C.

171.

2. Term Rep.

190.

TWISDEN, *Justice*, was absent; but he desired MR. JUSTICE JONES to declare, that his opinion was, that the party ought to be remanded.

And so he was remanded by THE COURT (a).

(a) See the note to 2. Hawk. P. C. ch. 15. f. 73. the sixth edition, where all the cases respecting the power of parliament to commit in execution for a contempt of privilege are collected.

# TRINITY TERM,

The Twenty-Sixth of Charles the Second,

I N

The King's Bench.

Friday, June 19, 1674.

Sir Matthew Hale, *Knt. Chief Justice.*

Sir Thomas Twissden, *Knt.*

Sir Richard Rainsford, *Knt.*

Sir William Wylde, *Knt.*

} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington *Knt. Solicitor General.*

\* [ 159 ]

Cafe 1.

\* Pybus *against* Mitford.

*Trinity Term, 20. Car. 2. Roll 703.*

If a man cove-  
nant to stand  
seised to the use  
of the heirs  
male of his  
body by a second

**T**HIS CASE, having been several times argued at the bar,  
received judgment this Term.

The cafe was, *Michael Mitford* was seised of the lands in ques-  
tion in fee, and had issue by his second wife, *Ralph Mitford*; and  
wife, a use immediately arises to the covenantor for life; and the remainder over, being a remainder  
in special tail, becomes executed in him; so that on his death the son by the second venter shall take  
the estate by descent, as *special heir*, although he have a son by his first wife living at the time of his  
death.—S. C. ante, 98. 121. S. C. 3. Keb. 239. 316. 338. S. C. 2. Lev. 75. S. C. Ray. 225.  
S. C. 1. Vent. 372. S. C. 1. Freem. 351. 369. S. C. 2. Danv. 556. Post. 226. 237. 1. Roll.  
Abr. 240. Hob. 30. Co. Lit. 22, 23. 2. Mod. 207. 8. Mod. 23. 9. Mod. 162. 10. Mod.  
421. 436. 11. Mod. 96. 152. 181. 12. Mod. 38. 101. Gilb. Eq. Rep. 20. 120. Prec. in  
Chan. 342. 467. Comyns, 119. 160. 2. Peer. Wms. 139. 3. Peer. Wms. 63. 367. 2. Ld.  
Ray. 854. Pollexf. 467. 582. Saund. on Uses and Trusts, 154. 176. 180. 3. Com. Dig.  
“Descent,” 3. Salk. 336. 11. Mod. 189. 2. Peer. Wms. 1. Proc. in Ch. 54. 442. 461.  
Mr. Hargrave’s note (3). Co. Lit. 24. b. in page 31. a. and note (2), page 164. a. 1. Chan. Cal.  
145. 1. Sira. 41. Gilb. Rep. 116. 131. 5. Burr. 2615. Powell on Dev. 374. 389. 1. Will. 31.  
5. Burr. 2626. Ambler’s Rep. 11. 4. Term Rep. 82.

Trinity Term, 26. Car. 2. In B. R.

On the 23. *January*, 21. *Jac.* 1. by indenture made between the said *Michael* of the one part, and *Sir Ralph Dalivell* and others of the other part, HE COVENANTED to stand immediately seised, after the date of the said indenture (amongst others) of the lands in question, by these words, *viz.* "to the use of the heirs males of the said *Michael Mitford*, begotten, or to be begotten, on the body of *Jane* his wife, the reversion to his own right heirs." After which *Michael* died, leaving issue *Robert* his son and heir by a first venter, and the said *Ralph* by *Jane* his second wife. After the death of *Michael*, *Robert* entered, and from *Robert*, by divers mesne conveyances, a title was deduced to the heir of the plaintiff. *Ralph* had issue *Robert*, the defendant.

Pybus  
against  
MITFORD.

And in this special verdict, the question was, If any use did arise to *Ralph* by this indenture made 23. *January*, 21. *Jac.* 1.?

HALE, *Chief Justice*, RAINSFORD and WYLDE, *Justices*, (against the opinion of TWISDEN) were of opinion, that *Michael Mitford* took an estate for life by implication and consequence, and so had an estate-tail.

HALE, *Chief Justice*, said, FIRST, It were clear if an estate for life had been limited to *Michael*, and to the heirs males of the body of *Michael*, to be begotten on the body of his second wife, that had been an estate-tail.—SECONDLY, Which way soever it be, the estate is lodged in *Michael* during his life.—THIRDLY, There is a great difference between estates to be conveyed by the rules of the common-law, and estates conveyed by way of use; for he may mould the use in himself in what estate he will. These things being premised, he said, this estate being turned by operation of \* law into an estate in *Michael*, is as strong as if he had limited an estate in himself for life.—SECONDLY, A limitation to the heirs of his body, is in effect a limitation to the use of himself; for his heirs are included in himself.—THIRDLY, It is perfectly according to the intention of the party, which was, That his eldest son should not take, but that the issue of the second wife should take.

\* [ 160 ]  
Post. 237. 327.  
Co. Lit. 22. a.  
1. Vezey, 153.

FIRST it is objected, That his intent appears to be, that it should take effect as a future use. But when a man limits a use to commence *in futuro*, and there is such a descensible quality left in him that his heirs may take in the mean time, there it shall operate solely by way of future use: as if a man covenant to stand seised to the use of *J. S.* after the expiration of forty years, or after the death of *J. D.* there no present alteration of the estate is made, but it is only a future use, because the father or the ancestor had such an interest left in him which might descend to his heir, *viz.* during the years, or during the life of *J. D.* But when no estate may, by reason of the limitation, descend to the heir until the contingency happen, there the estate of the covenantor is moulded to an estate for life.

1. Vent. 379.  
Ante, 121, 122.  
Post. 237, 238.

Trinity Term, 26. Car. 2. In B. R.

Pybus  
against  
MITFORD.

SECONDLY it is objected, That this would be to create an estate by implication. But we are not here to create an estate, but only to qualify an estate which was in the ancestor before.

THIRDLY it is objected, That the old fee-simple should be left in him.—But the covenantor had qualified this estate, and converted it into an estate-tail, viz. part of the old estate.

FOURTHLY it is objected, That the intention of the parties appears, that it should operate by way of future use; for that of other lands he covenanted to stand seised to the use of himself, and his heirs of his body.—But it is not the intention of the party that shall controul the operation of law; and to the case 1. *Inst.* 22. though it be objected, that it was not necessary at the law to raise an estate for life by implication, yet my LORD COKE hath taken notice what he had said in the case of *Parnell v. Fenn*, *Roll. Rep.* 240. If a man make a feoffment to the use of the heirs of his body, that is an estate for life in the feoffor: and in *Englefield's Case*, as it is reported in *Moore* 303. it is agreed, that if a man covenant to stand seised to a use to commence after his death, the covenantor thereby is become seised for life.

\* [ 161 ]

7. Co. 103. b.  
Co. Lit. 24.  
Hob. 31.  
Post, 338.

2. Vent. 381,  
382.  
Co. Lit. 22.

TWISDEN, RAINSFORD, and WYLDE, *Justices*, as to the second point held, That no future use would arise to *Ralph*, because he is not heir at common law; and none can *purchase* by the name of heir, unless he be heir at common law.—But HALE, *Chief Justice*, was against them in this point; and he held, That if *Ralph* could not take by *descent*, yet he might well take by *purchase*:—FIRST, Because before the statute *de donis*, a limitation might be made to this heir, and so he was a *special heir* at common law:—SECONDLY, It is apparent that he had taken notice that he had an heir at the common law: so his intent is evident, that the heir at common law should not take.—But on THE FIRST POINT judgment was given for the defendant.

\* [ 162 ]

[ \* This page is a blank in the former edition. ]

# CASES IN THE COMMON PLEAS

FROM

Michaelmas Term, 25. Car. 2.

TO

Trinity Term, 29. Car. 2. inclusive,

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## MICHAELMAS TERM,

The Twenty-Fifth of Charles the Second,

IN

The Common Pleas.

*Sir John Vaughan, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

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• Anonymous.

\* [ 163 ]

Cafe 1.

**I**F a man be liable to pay a yearly sum, as treasurer to a church, or the like, to a sub-treasurer, or any other, and dies, the money being in arrear, an action of *assumpsit* cannot be maintained against his executors for these arrears: for although, *Assumpsit* cannot be maintained for the arrears of an annuity against executors, because there is no personal privity.—4. Co. 92. b. Yelv. 20. Moor, 433. 667. 10. Mod. 23. See *vide* Hambley v. Trott, Cowp. 375.

M 4

according

## Michaelmas Term, 25. Car. 2. In C. B.

ANONYMOUS.

according to the resolution in *Slade's Case* (a), which VAUGHAN, Chief Justice, said, was a strange resolution, an *assumpsit*, or an action of *debt*, is maintainable upon a *contract*, at the party's election; yet where there is no contract, nor any personal privity, as in this case there is not, an *assumpsit* will not lie.

In an action against an executor for a debt due from the testator out of a particular fund, it must be averred that the fund was solvent, &c.

And in an action of debt for these arrears the plaintiff must aver, that there is so much money in the treasury as he demands; and in this case of an action against executors, that there was so much at the time of the testator's death, &c.; for the money is due from him as treasurer, and not to be paid out of his own estate: as in an action against the king's receiver, the plaintiff must set forth, that he has so much money of the king's in his coffers.

(a) 4. Co. 92. Moor, 433. Yelv. 20. Godol. 176. 196. Hughes Ent. 3.

### Case 2.

### Magdalen College's Case.

The chancellor of the universities of Oxford or Cambridge shall be allowed cognizance of an action brought

\* [ 164 ]

in the superior court against the president and scholars of a college for goods sold and delivered to their use.

8. Hen. 6.

pl. 19, 20.

6. Hen. 7.

pl. 9.

1. Roll. Abr.

492.

Dyer, 157. 4. Inst. 227. Hard. 189. 506. 509. &c. 2. Vent. 362. 1. Chan. Cases, 237.

Lit. R. p. 40. 304. N. Benl. 88. 2. Danv. 161. 166. Cro. Car. 73. 88. Hetl. 25. Skin. 665.

2. Vent. 362. 10. Mod. 126. 1. Ld. Ray. 342. 2. Ld. Ray. 1344. 2. Stra. 810. 1. Salk.

343. 671. Annally's Rep. 241. 2. Willf. 310. 406. 3. Bl. Com. 301. 2. Com. Dig. "Courts"

(P 3.)

**I**NDEBITATUS ASSUMPSIT against the president and scholars of *Magdalen College* in *Oxford*, for threescore pounds due for butter and cheese sold to the college. The chancellor of the university demanded *consuance*, by virtue of charters of privileges granted to the university by the king's progenitors, and confirmed by act of parliament; whereby, amongst other things, power is given them to hold plea in personal actions, wherein scholars, or other privileged persons, are \* concerned; and concludes with an express demand of *consuance* in this particular cause.

BALDWIN, *Serjeant*. Their privilege extends not to this case; for a corporation is defendant; and their charters mention privileged persons only. Their charters are in derogation of the common law, and must be taken strictly. They make this demand upon charters confirmed by act of parliament: and they have a charter granted by *King Henry the Eighth*, which is confirmed by the statute 13. *Eliz.* c. 21.; but the charter of *King Charles the First* (which is the only charter that mentions corporations) is not confirmed by any act of parliament (b), and consequently is

(b) The university of *Oxford* originally held a court *lex*; but by charters 12. Rich. 2. and 14. Hen. 8. confirmed by statute 13. *Eliz.* c. 29. it is incorporated *de novo*; and with its other franchises and privileges, this of *consuance* is established in all pleas for trespass, and in all complaints, misdemeanors, and crimes (except pleas of freehold) "ubi

"scholares, servi, aut ministri, sunt una  
"partium secundum statuta vel consuetu-  
"dines, &c. VEL secundum legem regi-  
"at voluntatem cancellarii; ITA QUOD  
"Justitiae de Banco Regis, de Comuni  
"Banco, vel de assis non se intromi-  
"tant." 4. Inst. 227. Litt. 10.  
1. Salk. 343. and see Com. Dig. title,  
"University."

not

Michaelmas Term, 25. Car. 2. In C. B.

not material as to this demand; for a demand of consuance is *stricti juris*. But admitting it material, the king's patent cannot deprive us of the benefit of the common law; and in the vice-chancellor's court they proceed by the civil law. If you allow this demand, there will be a failure of justice; for the defendants, being a corporation, cannot be arrested; they can make no stipulation; the vice-chancellor's court cannot issue *distringas*'s against their lands, nor can they be excommunicated. Precedents we find of corporations suing there as plaintiffs (in which case the aforementioned inconvenience does not ensue), but none of actions brought against corporations.

MAGDALEN  
COLLEGE'S  
CASE.

MAYNARD, *contra*. Servants to colleges and officers of corporations have been allowed the privilege of the university, which they could not have in their own right; and if in their master's right, *a fortiori* their masters shall enjoy it. The word "*persona*" in the demand will include a corporation well enough.

VAUGHAN, *Chief Justice*. Perhaps the words "*atque con-  
firmat. &c.*" in the demand of consuance are not material; for the privileges of the university are grounded on their patents, which are good in law, whether confirmed by parliament or not. The word "*persona*" does include corporations: 2. *Inst.* 256. *per COKE*, upon the statute of 31. *Elix.* c. 7. of cottages and inmates (*a*). A demand of consuance is not in derogation of the common law; for the king may by law grant *tenere placita*, though it may fall out to be in derogation of WESTMINSTER-HALL. Nor will there be a failure of justice; for when a corporation is defendant, they make them give bond, and put in stipulators that they will satisfy the judgment; and if they do not perform the condition of their \* bond, they commit the bail. They have enjoyed these privileges some hundreds of years ago.

(a) Repealed by  
15. Geo. 3. c. 22.

\* [ 165 ]

The rest of THE JUDGES agreed, that the university ought to have consuance.

But ATKINS, *Justice*, objected against the form of the demand, that the words "*persona privilegiata*" cannot comprehend a corporation in a demand of consuance, howsoever the sense may carry it in an act of parliament.

ELLIS and WYNDHAM, *Justices*. If neither scholars nor privileged persons had been mentioned, but an express demand made of consuance in this particular cause, it had then been sufficient; and then a fault, if it be one in surplusage, and a matter that comes in by way of preface, shall not hurt.

ATKINS, *Justice*. It is not a preface; they lay it as the foundation and ground of their claim.

The demand was allowed as to matter and form.

Rogers

Michaelmas Term, 25. Car. 2. In C. B.

Cafe 3.

Rogers *against* Danvers.

An executor who is bound in a joint and several bond with his testator, may plead the bond and no assets *ultra*, or may give payment of it in evidence under a *plea administravit*.

3. C. 1. Freom. 127.

1. Lev. 132. 291. 201. 227. 261.

2. Lev. 40. 118. 124.

3. Lev. 311.

1. Sid. 404.

Raym. 153.

\* [ 166 ]

Vaugh. 104.

Carter, 221.

1. Lutw. 241.

2. Mod. 36.

4. Mod. 63. 296. 8. Mod. 288. 9. Mod. 89. 10. Mod. 171. 315. 426. Cases Temp. Tab. 240.

**D**EBT against *S. Danvers* and *D. Danvers*, executors of *G. Danvers*, upon a bond of one hundred pounds entered into by the testator. The defendants pleaded, that *G. Danvers*, the testator, had acknowledged a recognizance in the nature of A STATUTE STAPLE of twelve hundred pounds to *J. S.* and that they have no assets *ultra*, &c. The plaintiff replied, that *D. Danvers*, one of the defendants, was bound, together with the testator, in that statute ; to which the defendants demur.

BALDWIN, *Serjeant*, for the defendant. If this plea were not good, we might be doubly charged. It is true, one of us acknowledged the statute likewise, but in this action we are sued as executors. This statute of twelve hundred pounds was joint and several ; so that the conusee may at his election either sue the surviving conusor, or the executors of him that is dead ; so that the testator's goods that are in our hands are liable to this statute. It runs, "*concesserunt se et utrumque eorum.*" If it were joint, the charge would survive, and then it were against us. It is common for executors, upon "*pleinment administer*" pleaded, to give in evidence payment of bonds in which themselves were bound with the testator ; and sometimes \* such persons are made executors for their security.

THE COURT was of opinion against the plaintiff ; whereupon he prayed leave to discontinue ; and had it.

Cafe 4.

Amie *against* Andrews.

A promise made by *A.* to pay a debt due from *B.* to *C.* in consideration that *C.* bring two witnesses to prove it on oath, before a justice of peace, to be a just debt, is good, and will sustain an *assumpsit*.

S. C. 1. Danv. 45.

Ante 47.

Puff. 169. 284. Cro. Eliz. 469. 2. Saund. 136. 7. Mod. 13. 10. Mod. 295. 1. Salk. 25. 23. 1. Ld. Ray. 358. 368. 2. Ld. Ray. 753. 759. 838. 909. 919. 982. 1. Stra. 94. 57. 2. S. 12. 933. 1027.

**A**SSUMPSIT. The plaintiff declares, That whereas the father of the defendant was indebted to him in twenty pounds for malt sold, and promised to pay it ; that the defendant, in consideration that the plaintiff would bring two witnesses before a justice of peace, who upon their oaths should depose, that the defendant's father was indebted to the plaintiff, and promised payment, assumed and promised to pay the money : then avers, that he did bring two witnesses, &c. who did swear, &c. The defendant pleaded *non assumpsit* ; which was found against him.

SERJEANT BALDWIN moved in arrest of judgment, that the consideration was not lawful (a) ; because a justice of peace not having power to administer an oath in this case, it is an extrajudicial oath, and consequently unlawful.

(a) See the case of *Elmes v. Wills*, 1. H. Bl. Rep. 64.

And

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And VAUGHAN, *Chief Justice*, was of opinion, that every oath not legally administered and taken is within the statute against prophane swearing (a). And he said, it would be of dangerous consequence to countenance these extrajudicial oaths, for that it would tend to the overthrowing of legal proofs (b).

AMRE  
against  
ANDREWS.

WYNDHAM and ATKINS, *Justices*, thought it was not a prophane oath, nor within the statute of *King James*, because it tended to the determining of a controversy.—And accordingly the plaintiff had judgment.

(a) 21. Jac. 1. c. 20. repealed and re-enacted by 19. Geo. 2. c. 21. See 8. Mod. 59. 10. Mod. 213. Stra. 498. 1. Hawk. P. C. 12. (b) See Gilbert's Law of Evidence, 4th edit. 66.

\* Horton against Wilfon.

\* [ 167 ]  
Case 5.

A PROHIBITION was prayed to stay a suit in the spiritual court commenced by a proctor for his fees.

If a proctor libel in the spiritual court for fees in a suit there, and also for the expenses of a journey, the charge of a messenger, and other disbursements, a prohibition shall go as to all except the fees.

VAUGHAN, *Chief Justice*, and WYNDHAM, *Justice*. No court can better judge of the fees, that have been due and usual there, than themselves. Most of their fees are appointed by constitutions provincial, and they prove them by them. A proctor lately libelled in the spiritual court for his fees, and, amongst other things, demanded a groat for every instrument that had been read in the cause: the client pretended that he ought to have but fourpence for all. They gave sentence for the defendant. The plaintiff appealed, and then a prohibition was prayed in the court of king's bench. The opinion of the Court was, That the libel for his fees was most proper for the spiritual court; but that because the plaintiff there demanded a customary fee, that it ought to be determined by law, Whether such a fee were customary, or no? And accordingly they granted a prohibition in that case. It is like the case of a *modus* for tithes; for whatever ariseth out of the custom of the kingdom, is properly determinable at common law. But in this case they were of opinion, that the spiritual court ought not to be prohibited; and therefore granted a prohibition *quoad* some other particulars in the libel which were of temporal cognizance, but not as to the suit for fees.

S. C. 3. Keb. 203.  
S. C. 1. Freeman.  
129.  
2. Danv. 434.  
Skin. 589.  
2. Keb. 615.  
3. Keb. 442.  
516.  
1. Salk. 330.  
334.  
Comyns, 18.  
4. Mod. 254.  
5. Mod. 242.  
238.  
10. Mod. 261.  
440.  
12. Mod. 583.  
1. Ld. Ray.  
703.  
2. Stra. 1108.

WYNDHAM, *Justice*, said, If there had been an actual contract upon the retainer, the plaintiff ought to have sued at law.

ATKINS, *Justice*, thought a prohibition ought to go for the whole. Fees, he said, had no relation to the jurisdiction of the spiritual court, nor to the cause in which the proctor was retained. No suit ought to be suffered in the spiritual court, when the plaintiff has a remedy at law; as here he might in an action upon the case; for the retainer is an implied contract. A difference about the grant of the office of register, in a bishop's court, shall be tried at common law, though the *subjetum circa quod* be spiritual;

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HORTON  
against  
WILSON.

ritual: 2. Roll. 285. pl. 45. and 2. Roll. Abr. 283. *Wadworth v. Andrewes*. Shall a *Six-Clerk* prefer a bill in equity for his fees? —But a prohibition was granted *quoad, &c (a)*.

(a) S. C. 1. Free. 129. agrees; but in S. C. 3. Keb. 203. it is said, that as the Court were divided no prohibition was awarded, but that the parties were ordered to declare, and the proceedings in the mean time to be stayed. In the S. C. cited 4. Mod. 254. and 5. Mod. 240, 241. it is said the prohibition as to the fees was denied. See also 2. Roll. Rep. 59. And in the case of *Johnston v. Lee*, Skin. 589. where the principal

question was, Whether proctors may sue for their fees in the spiritual court? Holt, *Chief Justice*, inclined they could not. In *Johnston v. Oxenden*, 4. Mod. 255. a suit for a proctor's fees was stayed, 1. Ld. Ray. 703. And it has also been determined, that a *register*, Salk. 333. 11. Mod. 608. an *apparitor*, Dougl. 3d edit. 629. a *parish-clerk*, 2. Str. 1108. cannot sue in the spiritual court for their fees. See 4. Com. Dig. 494.

• [ 168 ]  
Case 6.

\* *Glever against Hynde and Others.*

TO an action of assault and battery, a plea that the plaintiff disturbed a congregation while the minister was performing the rites of burial, and that the defendant (though neither constable, churchwarden, or other officer) *molliter manus imposuit* to prevent such disturbance, is a good justification.  
12. Mod. 610.  
11. Mod. 64.  
1. Ld. Ray. 62. 277.  
1. Str. 688.  
1. S. und. 13.  
1. Hawk. F. C. 271.

**G**LEVER brought an action of trespass, of assault and battery, against *Elizabeth Hynde* and six others, For that they at *York-castle*, in the county of *York*, him, the said plaintiff, with force and arms did assault, beat, and evil-entreat, to his damage of one hundred pounds.

The defendants plead to the *vi et armis*, not guilty; to the assault, beating, and evil-entreating, they say, that at such a place, in the county of *Lancaster*, one *Jackson*, a curate, was performing the rites and funeral obsequies, according to the usage of the church of *England*, over the body of —, there lying dead, and ready to be buried; and that then and there the plaintiff did maliciously disturb him; that they, the defendants, required him to desist; and because he would not, that they to remove him, and for the preventing of further disturbance, *molliter ei manus imposuerunt, &c. quæ est eadem transgressio*; *ABSQUE HOC* that they were guilty of any assault, &c. within the county of *York*, or any where else *extra comitatum Lancastriæ*.—The plaintiff demurs.

**TURNER for the plaintiff.** The defendants do not shew that they had any authority to lay hands on the plaintiff; as that they were *constables*, or *church-wardens*, or any *officers*; nor do they justify by the authority of any that were. If they had pleaded, that they laid hands on him to carry him before a justice of peace, perhaps it might have altered the case. The plaintiff here, if he be faulty, is liable to ecclesiastical censure; and the statute of 1. *Philip & Mary*, c. 3. provides a remedy in such cases.

**JONES contra.** If the statute of *Philip & Mary* did extend to this case, yet it does not restrain other ways that the law allows to punish the plaintiff, or keep him quiet. Our Saviour himself has given us a precedent; he whipped buyers and sellers out of the Temple; when act of buying and selling was not so great an impiety, as to disturb the worship of God in the very act and exercise of it.

THE

Michaelmas Term, 25. Car. 2. In C. B.

THE COURT. The statute of 1. *Philip & Mary* concerns preachers only: but there is another act, made 1. *Eliz.* c. 2. f. 9. that extends to all men in orders that perform any part of the public service. But neither of these statutes take away the common law. And at the common law, any person there present might have removed the plaintiff; for they were all concerned in the service of God that was then performing; so that the plaintiff in disturbing it, was a nuisance to them all; and might be removed by the same rule of law that allows a man to abate a nuisance.—Whereupon judgment was given for the defendant, *nisi causa, &c.*

GLEYER  
against  
HYNDE;  
AND OTHERS.

\* [ 169 ]

See 6. Edw. 6. c. 4. the 1. Mary, c. 3. and the 1. Will. & Mary, c. 18. f. 19.

Anonymous.

Case 7.

ACTION UPON THE CASE. The plaintiff declares, That whereas the testator of the defendant was indebted to the plaintiff at the time of his death in the sum of twelve pounds ten shillings; that the defendant, in consideration of forbearance, promised to pay him five pounds at such a time, and five pounds more at such a time after, and the other fifty shillings when he should have received money: then avers, that he did forbear, &c. and saith, that the defendant paid the two five pounds; but for the fifty shillings residue, that he hath received money, but hath not paid it. The defendant pleaded *non assumpsit*, which was found against him.

An *assumpsit* on a promise to pay fifty shillings when he received money, &c. ought to aver how much he received, and from whom, and when, and where, received; but on the general issue pleaded these defaults are aided by the verdict.

WILMOT moved in arrest of judgment, That the plaintiff doth not set forth how much money the defendant had received, who perhaps had not received so much as fifty shillings: he said, though the promise was general, yet the breach ought to be laid so, as to be adequate to the consideration.—And SECONDLY, That the plaintiff ought to have set forth of whom the defendant received the money, and when, and where, because the receipt was traversable.

Ante, 43. 115-166.  
Post. 284.  
Litch. 203.  
2. Jones, 143.  
Cro. Car. 437.  
Carth. 130.  
1. Sid. 423.  
10. Mod. 254.  
2. Ld. Ray. 838. 1217.  
4. Bac. Abr. 24. notis.  
2. Bl. Rep. 820.  
Doug. 658.  
1. Ter. Rep. 543.

THE COURT agreed, That there was good cause to demur to the declaration: but after a verdict they would intend, that the defendant had received fifty shillings; because else the jury would not have given so much in damages. And for the other exception, they held, That the defendant having taken the general issue, had waived the benefit thereof.

\* [ 170 ]

\* Alford against Tatnell.

Case 8.

GREGORY ALFORD and Melchisedec Alford were bound, jointly and severally, to Tatnell in a bond of seven hundred pounds. The obligee brought several actions; obtained two de-

If two joint and several obligors are outlawed; and one of them,

being taken on the *capias ultionatum*, is suffered to escape; and the obligee obtain satisfaction in *debitum* against the sheriff for the escape; the other obligor on being taken may bring an *audita querela*, but he must shew the time when and place where satisfaction was made.—S. C. 2. Mod. 49. Ante, 111. 116. Post. 224. 1. Roll. Rep. 8. Hcb. 2. Cro. Jac. 378. 12. Mod. 105. 558. 2. Bull. 97. Godb. 257. 2. Bl. Rep. 1050. 3. Bac. Abr. 699. Cramp. Prac. 422.

verbal

## Michaelmas Term, 25. Car. 2. In C. B.

**ALFORD**  
against  
**TATNELL.**

veral judgments in this court against the obligors ; sued both to an outlawry ; and in *Michaelmas* Term, 18. *Car.* 2. both were returned outlawed. In *Hilary Term* following, *Gregory Alford* was taken upon a *capias utlagatum* by *Browne*, sheriff of *Dorsetshire* ; who voluntarily suffered him to escape. *Tatnell* brought an action of *debt* upon this escape against *Brown*, and recovered, and received satisfaction ; notwithstanding which he proceeded to take *Melchisedec Alford*, who brought an *audita querela*, and set forth all this matter in his declaration.—Upon a demurrer, the opinion of THE COURT was against the plaintiff for a fault in the declaration, *viz.* Because the satisfaction made to the plaintiff by the sheriff was not specially pleaded, *viz.* time and place alledged where it was made ; for it is issuable, and, for aught appears by the declaration, it was made after the writ of *audita querela* purchased, and before the declaration.

THE COURT said, If *Tatnell* had only brought an action on the case against the sheriff, and recovered damages for the escape, though he had had the damages paid, that would not have been sufficient ground for the plaintiff here to bring an *audita querela* ; but in this case he recovered his original debt in an action of *debt* grounded upon the escape, which is a sufficient ground of action if he had declared well.—They gave day to shew cause, why the declaration should not be amended, paying costs.

### Casé 9.

### Anonymous.

An officer may justify arresting a man by virtue of a *capias* issued before *summons* out of a court in

\* [ 171 ]  
the county palatine of *Durham* described as  
“ AN ANCIENT  
“ COURT holden  
“ before THE  
“ SHERIFF of  
“ the county, and  
“ called THE  
“ COUNTY  
“ COURT, &c.  
“ &c.” for  
although the proceedings are irregular, yet the court having power to issue the writ, the officer is bound to execute it.—*Post.* 272.  
2. Saund. 182. 1. Stra. 509. 2. Ld. Ray. 1530.

**FALSE IMPRISONMENT.** The defendants justify by virtue of a warrant out of a court within the county-palatine of *Durham*. The plaintiff demurs.

The material part of the plea was, That there was an ANCIENT COURT holden before the sheriff of the county, &c. called THE COUNTY-COURT, which was accustomed to be held from fifteen days to fifteen days ; and that there was a custom, upon a writ of *questus est nobis* issuing out of the county-palatine of *Durham*, and delivered to the sheriff, &c. that, upon the plaintiff's affirming *quandam querelam* against such person or persons against whom the *questus est nobis* issued, the sheriff used to make out a writ in the nature of a *capias ad satisfaciendum* against him or them, &c. that such a writ of *questus est nobis* issued *ex curia cancellariæ Dunelm.* and was delivered to the sheriff, who thereupon made a *precept* to his bailiffs to take the plaintiff, who thereupon was arrested ; which is the same imprisonment.

SERJEANT JONES, for the plaintiff, took exceptions to this plea: FIRST, The court is ill pleaded to be held before the plea: FIRST, The court is ill pleaded to be held before the

*Serif*

Michaelmas Term, 25. Car. 2. In C. B.

*Sheriff*, for in a county-court *the suitors* are the judges (a): ANONYMOUS.  
and though this court hold plea upon a *questus est nobis*, which is the king's writ, yet that doth not alter the nature of the court, nor its jurisdiction (b).

SECONDLY, The custom of holding this court *de quindecim diebus in quindecim dies* is void; being not only against MAGNA CHARTA, c. 35. but against the 2. & 3. Edw. 6. c. 25. which enacts, "that no county-court, &c. shall be longer deferred than *one month* from court to court, &c. any usage, custom, statute, or law to the contrary notwithstanding."

THIRDLY, He took these exceptions to the custom: 1st, It is absurd, that if upon a *questus est nobis* the party affirm *quandam querelam*, that then, &c.; for a *questus est nobis* is an action upon the case, and this *quædam querela* may be in any other action, though never so remote: the plaint ought to be in pursuance of the writ, and so to have been pleaded. 2dly, As this custom is laid, it does not appear that the plaint ought to arise within the jurisdiction of the court. 3dly, It is against the law, that in any inferior court a *capias* should be awarded before *summons* (c).

FOURTHLY, Exception to the declaration was, That it does not appear, Whether this writ were purchased out of the chancery of the city of *Durham*, or of that of the county? The words "*ex cur. cancellar. Dunelm.*" are applicable to either.

FIFTHLY, Here is not *an averment*, that the cause of action did arise within the county-palatine: it is said indeed, that he was indebted, and did assume within the county; but it is the contract and cause of the debt that entitles the court \* there to the action.

\* [ 172 ]

SIXTHLY, He says, that he did *levare quandam querelam*, but does not say that it was *super brevi de questus est nobis*; nor that it was *in placito prædicti*. nor makes any application at all of the plaint to the writ; and then the plaint not appearing to be warranted by the writ, and being for above forty shillings, the proceedings are *coram non iudice*.

SEVENTHLY, The sheriff's warrant is to arrest the party, *si inventus fuerit in ballivâ tuâ*; and it does not appear that the bailiff hath any bailiwick. If the county were divided into several divisions, and each bailiff allotted to a several division, this ought to have been shewn, and that the place where this arrest was made was within the bailiff's proper division.

EIGHTHLY, On the defendant's own shewing, the court was not held according to the custom alledged, *viz. de quindecim diebus in quindecim dies*; for the last court is said to have been held the 12th of *March*, and the next after that on the 26th *March*.

(a) Cro. Jac. 582.

(c) 1. Roll. 561. 2. Roll. 277.

(b) Gentleman's Case, 6. Co. 11, 12. 12. Mod. 598. 2. Ld. Rev. 1310.

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**ANONYMOUS.** **TURNER**, for the defendant, argued, that the imprisonment was lawful. To THE FIRST exception he said, That the court mentioned in the bar is not a county-court, nor so pleaded: it is pleaded as it is, *cur. VOCAT. cur. comitat.* and there were never any suitors known there to be judges: it is not to be examined according to the rules of county-courts, properly so called; for we plead it to be according to the custom of the county-palatine of *Durham*, which is an exempt jurisdiction.

As for THE SECOND exception to its being held *de quindecim diebus in quindecim dies*; the answer to the first exception answers this also. The Judges of assize in writs of *false judgment* have allowed this custom, and affirmed judgments given in this court; of which we have many precedents.

Cowp. 682.  
Doug. 159.

1. Term Rep.  
151.  
Cowp. 18.

Doug. 61.

• [ 173 ]

For THE THIRD exception concerning the validity of the custom; to the first exception against it he answered, That a bar is good enough if it be to a common intent, and the common intent is, that the *quædam querela* must be pursuant to the *questus est nobis*; and in this case it was so: the *questus est nobis* and the precept upon which the plaintiff was arrested, are both in an action of the case upon a promise:—and to the second, That the cause of action is shewn to arise within the jurisdiction; for the promise, which is the ground of this action, is said to have been made *infra comitat. palatin.*—To the third exception, That in inferior courts it is illegal to award a *capias* before *summons*; but this court is in a county-palatine; and such courts are like to the courts at *Westminster*, and have the same authority (a). \* And the customs of those courts are good warrants for their proceedings, as the custom of the king's bench is for their issuing *latitats*.

To THE FOURTH he said, It was a foreign intendment, to suppose a court of chancery in the city of *Durham*; a court of equity cannot be by grant, and there is no prescription in the city of *Durham*, to hold plea in equity.

To THE FIFTH he said, The promise was laid to have been made within the jurisdiction.

To THE SIXTH, *ut supra*.

To THE SEVENTH, That this precept was according to the form of all their precepts in like cases.

To THE EIGHTH, That taking both days inclusively, there are fifteen days. But admitting that there were some defect in the proceedings, yet since that court can issue such a writ as this, it is sufficient to excuse the officer (b).

2. Saund. 74.

THE COURT. This is not a county-court, but a court called "The County Court," and it is within a county-palatine; and

(a) *Rowlandson v. Simpson*, 1. Roll. 801. 1. Saund. 74.

(b) The case of the *Marshalls*, 10. Co. 68. b. to 77. b.

Michaelmas Term, 25. Car. 2. In C. B.

for both those reasons, not in the same degree with other county-  
courts. And though it were a county-court, it might by *prescrip- ANONYMOUS*  
*tion* be held before the sheriff, as a court-baron may, by a special  
prescription, be held *coram se. eschallo*; and so it hath been adjudged  
in the case of *Armyn v. Appletoft* (a). There is no such special  
prescription as there ought to be, but a general prescription for a  
court-baron, and every court-baron must be prescribed for. The  
county-palatine of *Durham* is not of late standing, like that of  
*Lancaster*, but is immemorial: and a custom there is of great  
authority. As to the objection against *quandam querelam*; why  
may it not be as allowable for a man there to bring a *questus est nobis*,  
and declare in what plaint he will, as it is here to arrest a man and  
declare against him in any action? But admitting the proceed-  
ings irregular, yet since the Court can issue a *capias*, that excuses  
the officer in this action.

An officer is  
justifiable in  
executing the  
process of a  
competent  
court, though

And judgment was given for the defendant, *nisi causa, &c.*  
proceedings are irregular.—Strange, 1002. 4. Bl. Com. 282. Loft, 18. 11. State Trials;  
321. 2. Hawk. P. C. 122. 130.

(a) Cro. Jac. 512. 1. Keb. 751.

# E A S T E R T E R M,

The Twenty-Sixth of Charles the Second,

I N

The Common Pleas.

Sir John Vaughan, *Chief Justice.*

Sir Robert Atkins, *Knt.*

Sir Hugh Wyndham, *Knt.*

Sir William Ellis, *Knt.*

} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

\* [ 174 ]

Case 10.

On *plene administravit* the defendant may give in evidence, that he was administrator *durante minore ætate*, and hath paid such debts, and delivered over the residue.

Hob. 250.

Ray. 483.

3. Leon. 103.

1. Sid. 57.

Latch. 160.

Cro. Eliz. 43.

\* Brooking *against* Jennings and Others.

THE plaintiff declared as executor against the defendants as executors also. The defendants pleaded severally "*plene administravit.*" Upon one of the issues a special verdict was found, *viz.* That the said defendant being executor *durante minore ætate* of an infant, had paid such and such debts and legacies, and had delivered over *totum residuum statûs personalis* of the testator to the infant executor, when he came of age.

ATKINS, *Justice.* This special verdict does not maintain the defendant's plea of "*fully administered;*" for that cannot be pleaded, unless all debts, &c. are discharged, as far as the *assets* will reach: which is not done here; for *residuum statûs personalis* is delivered over, &c. and that *residuum* is liable to the payment of this debt, which is yet undischarged.

But VAUGHAN, *Chief Justice*, WYNDHAM and ELLIS, *Justices*, held, That however an executor dischargeth himself of the estate that was the testator's, he may plead "*fully administered.*" and that it is his safest plea.

It was found by the same verdict, that the testator left a personal estate, to the value of two thousand pounds; that there were owing by him five hundred pounds, in debts upon specialties; five hundred pounds more, upon simple contracts; and that he had disposed of four hundred pounds in legacies: and that this defendant was executor *durante minore etate* of the testator's son; and that he had paid fourteen hundred pounds in discharge of the debts and legacies aforesaid; and had accounted with the infant executor, when he came of age; and that upon the payment of ninety-one pounds to him, the infant executor released to him all actions, &c. and, Whether, upon this whole matter, this defendant should be said to have administered? was the question.

An executorship *durante minore etate* ceases on the infant's coming to the age of seventeen years.  
5. Co. 29.  
Wentw. 307.  
Cro. Eliz. 602.  
Cro. Car. 240.  
2. Sid. 60.  
1. Leon. 74.  
3. Peer. Wms. 79.

1. Ld. Ray. 338. 408. 5. Mod. 395. 12. Mod. 194.

VAUGHAN, *Chief Justice*. When an infant executor comes of age, the power of an executor *durante minore etate* ceaseth; and the \* new executor is then liable to all actions: if the former executor wasted, the new one hath his remedy against him; but he is not liable to other men's suits (a). Nor is there any inconvenience in this; for still here is a person liable to all actions. It is objected, that possibly the new executor is not of ability to satisfy. I answer, If in some particular case it fall out to be so, that is by accident: and to argue from the possibility of such an accident, is to suppose the law fitted to answer all emergencies. —ATKINS, *Justice*, accorred. remedy against him. —Cro. Eliz. (459). 34. Hen. 6. pl. 14. Dyer, 339. Cro. Eliz. 43. 6. Co. 18. Latch. 60. 3. Term Rep. 587.

\* [ 175 ]  
An administrator *durante minore etate* is not liable to other men's actions after his power is expired; but if he has wasted the goods, the executor has

VAUGHAN, *Chief Justice*. It is said, That here are fifteen hundred pounds liable to pay this debt: for to pay debts upon simple contracts or legacies before it, is a *devastavit*; especially the defendant having notice of this debt (which was also found). That is a mistake, upon which some books run: but it is certainly not law. Debts upon *simple contracts* may be paid before *bonds*, unless the executors have timely notice given them of those bonds; and that notice must be by action. —ATKINS and ELLIS agreed with VAUGHAN: WYNDHAM *dubitabat*.

An executor may pay *simple contract debts* before *specialties*, unless he has timely notice thereof by action.  
Cro. Eliz. 41.  
3. Mod. 115.  
Fitzg. 76.  
Bull. N. P. 178.  
Doug. 436.  
1. Term Rep. 690.

The case was put off to be argued next Trinity Term: but in the mean time the plaintiff discontinued.

(a) *Sed quare*; for it was determined in *Packman's Case*, that if an administrator waste the goods, and afterwards administration is committed to another, yet any *debts* shall charge him in debt; and if he plead the last administration committed to another, the other may

reply, that before the second administration committed he had wasted the goods, 6. Co. 18.; and it is said Bull. N. P. 145, that this seems the most reasonable determination. See also Latch. 160. 268. Cro. Car. 88. Hob. 49. 266.

Easter Term, 26. Car. 2. In C. S.

Case 11.

Scudamore *against* Croffing.

Trinity Term, 22. Car. 2. Roll 871:

In the Exchequer Chamber.

If a man seised in fee "give  
" and grant,  
" bargain and  
" sell, alien,  
" enfeoff, and  
" confirm,"  
certain lands to  
his daughter, in  
consideration of  
blood and mar-  
riage, he thereby  
raises a use by  
way of covenant  
to stand seised.

S. C. 2. Lev. 9.  
S. C. 1. Vent. 137.  
S. C. 2. Keb.  
754. 784.

\* [ 176 ]

Ante, 91. 121.  
159.  
2. Lev. 75.  
1. Vent. 372.  
2. Rol. Abr. 786.  
2. Mod. 207.  
9. Mod. 162.  
176.  
11. Mod. 96.  
153. 131. 196.  
210.  
12. Mod. 38.  
101. 160.  
Fitzg. 301.  
1. Ld. Ray. 290.  
2. Ld. Ray.  
799. 801. 854.  
876.  
2. Pr. Wms. 139.

**EJECTMENT.** ON A SPECIAL VERDICT, it was found, That a man by deed did give and grant, bargain and sell, alien, enfeoff, and confirm to his daughter certain lands; but no consideration of *money* is mentioned, nor is the deed enrolled: there is likewise no consideration of *natural affection* expressed other than what is implied in naming the grantee *his daughter*: there is no livery indorsed, nor any found to have been made; nor was the daughter in possession at the time of the deed made.

The question was, Whether this were a void deed, or had any operation at all in the law, and what was wrought by it?

In the king's bench it was adjudged by THE WHOLE COURT to be a good deed, and that it carried the estate to the daughter by way of covenant to stand seised (a).

Upon a writ of error before the justices of the common pleas and the barons of the exchequer, the case was argued at Serjeants-Inn, by SIR WILLIAM JONES against the deed, and \* by SIR FRANCIS WINNINGTON in maintenance of it.

JONES. Before the statute of uses, 27. Hen. 8. c. 10. a man might either have retained *the possession*, and have departed with *the use*, or he might have departed with *the possession*, and have retained *the use*; or he might have departed with them both together. The statute unites *the possession* to *the use*; but leaves men at liberty to convey their estates by putting the possession out of themselves, and limiting an use; or by raising an use, and letting the possession follow that. Now how shall it be known when an estate must pass one of these ways, and when the other? That must appear by the intention of the party expressed in the deed. Some conveyances contain words that look both ways; some one way, and some another. If the words look both ways, then has he to whom the estate is intended to be conveyed, election to take it whichever way he likes best. A man in consideration of money granted, enfeoffed, bargained, and sold; and in the deed there was

(a) The case upon which the Court gave judgment is stated to be as follows: *Nicholas Hocky* was seised in fee; and in consideration of affection to his daughter made a deed to his daughter, enrolled within six months, whereby, in consideration of affection, and for her portion and preferment, and other valuable considerations, he bargained, sold, aliened, enfeoffed, and confirmed, to the said daughter the lands in question, with a clause of warranty, and a covenant for further assurance; and that the indenture

was made for the consideration aforesaid, and no other. S. C. 2. Lev. 9. And in two other reports of S. C. the deed is stated to be "for and in consideration of natural love, augmentation of her portion, and preferment of her in marriage, and other good and valuable consideration." S. C. 1. Vent. 137. S. C. 2. Keb. 784. See also Mr. Hargrave's note (1) Co. Lit. 49. a.; Melbourn v. Simpson, 2. Will. 22.; Wilkinson v. Tranmer, 2. Will. 75.

a letter

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a letter of attorney to make livery; and it was resolved to be a good conveyance by way of bargain and sale, if the deed were enrolled (a). Where the words are only proper to pass an estate by way of use, there you shall never take an estate at common-law: *Cro. Jac.* 210. In the case of *Adams v. Steer* (b), the case of *Denton v. Fettyplace* is there cited, that by the words of bargain and sale without attornment, a reversion passeth not (c). If the king bargain and sell, &c. no use can arise, because the king cannot stand seised to an use (d). On the other side, where the words are proper to pass the estate at common law, there nothing shall pass by way of use. A *quære* is made in *Dyer* (e), Whether or no, if a man, in consideration of mutual affection, &c. release to his brother, who is not in possession, an use thereby ariseth to the releassee? but this *quære* is resolved in a manuscript report that I have of that case, *viz.* That no use does arise. The case of *Ward v. Lambert* (f), and of *Osburn v. Churchman* (g), is the case in question. In *Roll's Second Part* (h), a man in consideration of marriage did give and grant to his wife, after his decease, to her and the heirs of her body, &c. and it was resolved, that nothing passed. This case is much stronger than ours: for there is but one way to make this good, *viz.* by raising an \* use: for as a conveyance at common law, it cannot be good, because a freehold cannot be granted to commence *in futuro*; and yet rather than recede from the words of the party, the deed was adjudged to be void. He cited *Foster v. Foster*, *Trinity Term* 1659 (i), which himself had argued. In the deed here in question there are words proper to pass an estate in possession, "give and grant." There is likewise a clause of warranty, of which the grantee should lose the benefit in a great measure, if he were *in the post*; for then he shall not *vouch*: and there are opinions that he cannot *rebut*; as in *Spirit v. Benice* (k). There is also a covenant, that after the sealing and delivery, and due execution of, &c. the party shall quietly enjoy, &c. Now what execution can be meant but by livery and seisin? *Foxe's Case* (l) has been objected; in which it is resolved, that the reversion in that case should pass by way of bargain and sale, though the words of the grant were, "demise, "let, and to farm let;" all words proper to a common-law conveyance. I answer, The consideration of money there expressed is so strong a consideration as to carry it that way; but the consideration of natural affection is not so strong; and so the cases are not alike. The consideration of money has been held so strong as to carry an estate of fee-simple in an use without words of inheritance.

SCUDAMORE  
against  
CROSSING.

[ 177 ]

(a) Heyward's Case, 2. Co. 35. a.  
to 37. b. Adams v. Steer, Cro. Jac.  
210. 2. Roll. 786. pl. 25.  
(b) Cro. Jac. 210.  
(c) Vide Cro. Jac. 50. Dr. Atkyn's Case.  
(d) Moor, 113.  
(e) Dyer, 302. b.  
(f) Cro. Eliz. 394. 397.

(g) Cro. Jac. 127.  
(h) 2. Roll.  
(i) Finch Ch. Rep. 170. 1. Lev.  
55. 1. Sid. 82. Ray. 43. 1. Keb.  
160. 225. 274. 319.  
(k) Cro. Car. 368. Stiles, 308.  
(l) 3. Co. 94. 2. Brownl. 291.

SCOTLANDS  
against  
CROSSING.

WINNINGTON, *contra*. He insisted upon the intention of the party, the consideration of blood and natural affection, and the necessity of making this deed good by way of covenant to stand seised, because it could not take effect any other way. The clause of warranty and covenant for quiet enjoyment, he said, were but forms of conveyances, and words of clerks; but the effectual words are those that contain the inducement of the party to make the conveyance, and the words that pass the estate (*a*). In *Foster's Case*, which had been cited against him, he said, the deed was as informal to pass the estate one way as another. In *Osburn v. Churchman* (*b*), he said, this point was started; but that the resolution was not upon this point: it came in question neither upon a special verdict nor a demurrer. *Tibs v. Purplewell* (*c*) answers all objections against our case, and is in form and substance the same with it. He cited a case of *Saunders v. Savin* (*d*), adjudged in the \* late times in the common pleas, *viz.* that where a man seised in fee of a rent-charge granted it to a kinsman for life, and the grantor died before attornment, it was resolved, that upon the sealing and delivery of the deed an use arose. Wherefore he prayed, that the judgment might be affirmed.

\* [ 178 ]

TURNER, *Chief Baron* of the Exchequer, TURNER and LITTLETON, *Barons*, and ATKINS, WYNDHAM, and ELLIS, *Justices* of the Court of Common Pleas, were for affirming the judgment.—VAUGHAN, *Chief Justice* of the Common Pleas, and THURLAND, *Puisne Baron*, against it.

1. Sid. 26.  
2. Vent. 140.  
1. Keb. 162.  
275.

Raym. 48.

The SIX JUDGES argued, FIRST, That in a covenant to stand seised, those words of "covenanting to stand seised to the use of," &c. are not absolutely necessary; and that it is sufficient if there are words that are tantamount.—SECONDLY, That no conveyance admits of such variety of words as does this of a covenant to stand seised.—THIRDLY, That Judges have always endeavoured to support deeds, *ut res magis valeat quam pereat*.—FOURTHLY, That the grantor in this case, by putting in plenty of words, shews, that he did not intend to tie himself up to any sort of conveyance.—FIFTHLY, That if the words "give and grant" had been alone in the deed, there would have been no question; and that if so, then *utile per inutile non vitiatur*.—SIXTHLY, That every man's deed must be taken most strongly against himself.—SEVENTHLY, That the words "give and grant" enure sometimes as a *grant*, sometimes as a *covenant*, sometimes as a *release*; and must be taken in that sense which will best support the intent of the party.—EIGHTHLY, That the very point of this case has received two full determinations upon debate; and that it were a thing of ill consequence to admit of so great an uncertainty in the law as now to alter it.—NINTHLY, That there is here a clear intent that the daughter should have this estate—

(a) Plowd. *Queries*, 305. 2. Roll. Abr. 787. pl. 25. Co. Lit. 49. Poph. 47.

(b) Cro. Jac. 127.

(c) 2. Roll. Abr. 786.

(d) Raym. 48. 2. Lev. 215.

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a deed; a good consideration to raise an use; and words that are tantamount to a covenant to stand seised. Wherefore the judgment was affirmed.

SCODAMORE  
against  
Crossing.

THURLAND, *Puisne Baron*, said, The intention of the party was not a sure rule to construe deeds by: that if lands were given *in connubio soluto ab omni servitio*, the intent of the giver is, to make a gift in *frank-marriage*; but the common law, that delights in certainty, will not understand his words so, because he does not say *in libero maritagio*. In our case, the \* first intent of the father was to settle the land upon his daughter: his second intent was to do it by such or such a conveyance: what conveyance he meant to do it by, we must know by his words. The words "give and grant" do generally and naturally work upon something *in esse*: strained constructions are not favoured in the law: nor ought heirs to be disinherited by forced and strained constructions. If this deed shall work as a covenant to stand seised, it will be in vain to study forms of conveyances; it is but throwing in words enough, and if the lands pass not one way, they will another. He cited *Blitheman v. Blitheman* (a), and *Dyer* 55.; and said *Pitfield v. Pierce* (b) was later than that of *Tibi v. Purplewell* (c), and of better authority.

\* [ 179 ]

VAUGHAN, *Chief Justice*, accordant. It is not clear that the words "give and grant" are sufficient to raise a use; but supposing that they are by a forced exposition, when nothing appears to the contrary, will it thence follow, that they may be taken in a sense directly contrary to their proper and genuine sense, in such a place as this, where all the other parts of the deed are wholly inconsistent with, and will not by any possibility admit of such a construction? He mentioned several clauses in the deed, which, he said, were proper only to a conveyance at common law. He appealed to the law before the statute of uses; and said, that where a use would not arise by the common law, there the statute executes no possession; and that by such a deed as this, no use would have arisen at the common law.—But the judgment was affirmed (d).

1. Sid. 26.

(a) Cro. Eliz. 279. 1. And. 294.  
2. Co. 52.

(b) 2. Roll. Abr. 783. March,  
50.

(c) 2. Roll. Abr. 786.

(d) See the case of *Garnish v. Wentworth*, Carter, 137. 2. Vent. 150, Moor, 35. 1. Leon. 25. 2. Roll. Abr. 786. And see an Essay on Uses and Trusts by F. W. Sanders, p. 556.

Gabriel Miles's Case.

Case 12:

GABRIEL MILES and his wife recovered in an action of debt against one *Cogan* two hundred pounds, and seventy pounds damages: the wife died, and the husband prayed to have execution upon the judgment without *seire facias*.—Co. Lit. 351. 3. Lev. 403. 3. Mod. 189. 1. Sid. 337. Cro. Car. 464. 10. Mod. 164. 246. 12. Mod. 346. 383. Gilb. Eq. Rep. 70. 84. Fitzg. 149. 205. 1. Vern. 396. 1. Ld. Ray. 244. 2. Ld. Ray. 105. 1. Peer. Wms. 378. 1. Willf. 302. Dougl. 637. H. Bl. Rep. 109.

If husband and wife recover in debt, and the wife die, the husband may take out execution on the judgment without *seire facias*.

Easter Term, 26. Car. 2. In C. B.

**GABRIEL MILES'S CASE.** upon this judgment. THE COURT, upon the first motion, inclined that it should not survive to the husband; but that administration ought to be committed of it, as a *thing in action*: but this Term they agreed, that the husband might take out execution; and that by the judgment \* it became his own debt, due to him in his own right. And accordingly he took out a *scire facias*; and the case of *Beaumont v. Long*, Cro. Car. 208. 227. was cited.

Cafe 13.

Anonymous.

A lease made the 10th day of *October*, *habendum* from the 10th day of *November*, for five years, is void for uncertainty.

Cro. Eliz. 773. 290.

Cro. Jac. 166.

6. Co. 36.

Gilb. Eq. Rep.

143. 235.

1. Stra. 651.

1. Ld. Ray. 737. Sheph. Touch.

105. 275.

2. Bl. Com.

Bac. Abr.

"Leases" (L).

Com. Dig.

"Estates"

(G 8.).

Run. Eject. 96.

**EJECTMENT.** The plaintiff declared upon a lease made the tenth day of *October*, *habendum* from the twentieth day of *November*, for five years. And the question, upon a special verdict, was, Whether this were a good or a void lease?

**JONES, Serjeant.** There are many cases in which the law rejects the limitation of the commencement of a lease, if it be impossible; as from the thirty-first of *September*, or the like: now this being altogether uncertain, and since there is nothing to determine your judgments what "*November*" he meant, whether last-past, or next-ensuing, it amounts to an impossible limitation: as in the *Bishop of Bath's Case* (a), in *Dorset's Case* (b), and in the case of *Elmes v. Leaves* (c).

**BALDWIN, contra.** The law will reject an impossible limitation, but not an uncertain limitation.

**VAUGHAN, Chief Justice, and ATKINS, Justice.** The law rejects an impossible limitation, because it cannot be any part of the parties agreement: but an uncertain limitation vitiates the lease, because it was part of the agreement; but we cannot determine it, not knowing how the contract was. There are many examples of leases being void for uncertainty of commencements; which could not have been adjudged void, if the limitation in this case were good.

**WYNDHAM and ELLIS, contra;** and that it should begin from the time of the delivery.

It was moved afterwards, and, *ELLIS being absent*, it was ruled by **VAUGHAN** and **ATKINS** against **WYNDHAM's** opinion, and the judgment was arrested.

(a) 1. Roll. Abr. 847. Co. Lit. 45. b. Eliz. 512. 2. Roll. Abr. 193. 211. 6. Co. 35. Moor, 417.

(b) 1. Roll. Abr. 847. pl. 7. Cro. (c) 3. Danv. Abr. 212. p. 10.

## \* Fowle against Doble.

## Case 14.

**FORMEDON** in the remainder. The case was thus: There were three sisters: the eldest was tenant in tail of a fourth part of one hundred and forty acres, &c. in three villis, *A. B.* and *C.* the remainder in fee-simple to the other two: the tenant in tail takes husband *Dr. Doble* the defendant. The husband and wife levy a FINE sur consueance de droit, to the use of them two, and the heirs of the body of his wife, the remainder in fee to the right heirs of the husband: and this fine was with warranty against them and the heirs of the wife. The wife dies without issue, living the husband, against whom *Lucy* and *Ruth*, the other two sisters, to whom the remainder in fee was limited, bring a FORMEDON in the remainder. The defendant, as to part of the lands in demand, viz. one hundred acres, pleaded "non tenure," and that such a one was tenant. To that plea the plaintiff demurred. As to the rest of the lands, he pleaded this fine with warranty. The plaintiffs made a frivolous replication, to which the defendant demurred. The plaintiff's counsel excepted to the defendant's plea of non tenure,

On non-tenure pleaded for one hundred acres to a formedon in remainder for one hundred and forty acres lying in three villis, the tenant need not set forth in which of the villis the hundred acres lie; but he must state who was tenant on the day of suing out the original writ.

S. C. 3. Keb. 186.  
S. C. 1. Freem.  
125. 157.  
S. C. Carter,  
239. 241.  
Post. 218. 250.  
Theol. Dig.  
b. 11. c. 22. f. 4.  
2. Danv. 570.  
N. Lut. 258. 306.  
Cro. Eliz. 233.  
Savil, 126.  
3. Lev. 330.  
10. Mod. 3. 143.  
11. Mod. 103.  
12. Mod. 512.  
1. Ld. Ray.  
229. 476.  
2. Bac. Ab. 592.  
4. Bac. Ab. 105.  
Ear. Notes, 332.  
1. Com. Dig.  
"Abatement"  
(F. 14.).

FIRST, That he does not express in which of the villis the one hundred acres lie (*a*).—But this was over-ruled; for the formedon being of so many several acres, he is not obliged to shew where those lie that he pleads "non tenure" of: he tells the plaintiff who is the tenant, which is enough for him.

SECONDLY, Because he that pleads "non tenure" in abatement, ought to set forth who was tenant *die impetrationis brevis orig. &c.*—But this was over-ruled also; for he says, that himself was not tenant *die impetrationis brevis origin.* but that such another *eodem die* was tenant; which is certain enough. When the tenant pleads non-tenure to the whole, he need not set forth who is tenant; otherwise when he pleads non-tenure of part (*b*). At the common law, if the tenant had pleaded non-tenure as to part, it would have abated all the writ (*c*): but by the statute of the 25. Edw. 3. c. 16. it is enacted, "that by the exception of non-tenure of parcel, no writ shall be abated, but only for that parcel whereof the non-tenure is alledged."

\* [ 182 ]

A THIRD EXCEPTION was taken to the pleading of the \* fine, viz. Because he pleaded a fine levied of a fourth part, without saying in how many parts to be divided.—This was also over-ruled, and *Charnock v. Worsley* (*d*) was cited, where a difference is taken betwixt a writ and a fine; and in a fine it is said to be good, that being but a common assurance; *aliter* in a writ (*e*). This exception seems levelled against the plaintiff's own writ, in which he demands a fourth part, without saying in how many parts to be divided.

In a formedon, the tenant may plead a fine levied of a fourth part of the term, without shewing in how many parts it was divided.

(a) See the Year Book 5. Edw. 3. pl. 140. 184. and Sir John Stanley's Case. 33. Hen. 6. pl. 51.

(b) See Year-Books 11. Hen. 4. pl. 15. 33. Hen. 6. pl. 51.

(c) 35. Hen. 6. pl. 6.

(d) 1. Leon. 114.

(e) Year-Book 19. Edw. 3. pl.

Fitz. Abr. 244.

A woman being tenant in tail, with remainder in fee to her sister, marries. The husband and wife levy a fine to the use of themselves, and the heirs of the body of the wife, with remainder in fee to the right heirs of the husband, with a warranty against them and the heirs of the wife.

The husband, on the death of his wife without issue, may plead this fine and warranty in bar of her sister's remainder in fee; for the warranty being merely nominal as to the husband did not survive as to him, but descended upon the sister, as collateral heir to his wife.

THE MATTER IN LAW was, Whether or no this warranty, being against the husband and wife, and the heirs of the wife, were a bar to the plaintiffs, or survived to the husband?—And it was RESOLVED to be a bar; for this warranty as to the husband, was destroyed as soon as it was created: the same breath that created it put an end to it: for the husband warranted during his own life only, and took back as large an estate as he warranted (a); which destroys his warranty. And this is LITTLETON's text: If a man make a feoffment in fee with warranty, and take back an estate in fee, the warranty is gone. But the destruction of the husband's warranty does not affect the wife's (b): and *Sym's Case* (c) was cited, upon which ELLIS said he much relied, and contended that *Herbert's Case* (d) can give no rule here; for that here the husband is seised only in right of the wife.

8. Co. 51, 52, &c.  
Cro. Jac. 217, 218.  
Bro. "Garrant," 14.  
Co. Lit. 373. b.  
Cases Temp. Talb. 237.

VAUGHAN said, FIRST, That if the fine in this case had been levied to a stranger for life, or in fee, who had been impleaded by another stranger; that in that case the tenant ought to have vouched the surviving husband, as well as the heir of the wife, or else he would have lost his warranty.—SECONDLY, he said, If the fine had been levied to the use of a stranger, who had been impleaded by the heirs of the wife, he questioned, Whether or no the tenant could have rebutted them for any more than a moiety? And he questioned the resolution of *Sym's Case*. There is a case cited in *Sym's Case* out of the Year Book 45. Edw. 3. pl. 23. which is expressly against the resolution of the case. It is said in THE REPORTS (e), That no judgment was given in that case, which is false; and that the case is not well abridged by BROOK (f), which is also false. If in case of a voucher a man loseth his warranty, that does not vouch all that are bound; why should not one that is rebutted have the like advantage? There is a resolution quoted in *Sym's Case*, out of the YEAR BOOK 5. Edw. 2. Fitz. tit. "Garrant," 78. upon which the judgment is said to be founded, being, as is there said, a case in point; but he conceived not; for HARVEY, that gave the rule, \* said, "*Le tenant poit barrer vous tous, erga un sole.*" In the case there were several co-heirs, and if all were demandants, all might have been barred; and if one be demandant, there is no question but she may be rebutted for her part. But *Sym's Case* is quite otherwise: for there one person is coheir to the guaranty, that is not heir to any part of the land. In the YEAR BOOK 6. Edw. 3. pl. 50. there is a case resolved upon the ground and reason of the 45. Edw. 3. For these reasons, he said, he could not rely upon *Sym's Case*. He agreed with the rest as to the rea-

\* [ 183 ]

(a) See *Spirit v. Bence*, Cro. Car. 370.  
(b) Year-Book 20. Hen. 7. pl. 1.  
(c) 8. Co. 51, Cro. Eliz. 33.

(d) 3. Co. 11.  
(e) 8. Co. 52.  
(f) Brook, "Garrant" 14.

Easter Term, 26. Car. 2. In C. B.

For why the warranty is destroyed, *viz.* Because the husband takes back as great an estate as he warranted; for then no use can be made of the warranty. If a man have land, and another warrant this land to one and his heirs, and one of them die without heirs, the survivor may be vouched without question. The husband never was obliged by this warranty; but as to him it was merely nominal; for from the very creation of it, it was impossible that it should be effectual to any purpose: he cited *Rolls v. Osborn* (a).

FOWLE  
against  
DOWLE.

THE WHOLE COURT agreeing in this opinion, judgment was given for the tenant (b).

(a) 1. Brownl. 90. 2. Brownl. 169.  
Hob. 20. Moor, 859. 4. Leon. 250.  
Winch's Ent. 1137,

(b) See the 4. Ann. c. 16. s. 21. and  
the case of *Williamson v. Hancock*,  
post. 193. and the cases there cited.

# TRINITY TERM,

The Twenty-Sixth of Charles the Second,

I N

The Common Pleas.

*Sir John Vaughan, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* [ 184 ]

Cafe 15.

An action will not lie against a Judge for a wrongful commitment, any more than for an erroneous judgment.

S. C. ante, 119.

S. C. 2. Mod.

218.

S. C. 2. Jones,

13.

S. C. Vaugh.

135.

S. C. 3. Keb.

322.

S. C. Freem. 1.

Ante, 185.

Allen, 12

1. S. d. 273.

313.

4. Init. 374.

12. Mod. 308.

3. 265.

1. Ld. Ray. 263. 468.

\* Hamond *against* Howell, Recorder of London.

THE PLAINTIFF brought an action of *false imprisonment* against the *mayor of London*, the recorder, and the whole court at the OLD BAILEY, and the sheriffs and gaoler, for committing him to prison at a sessions there held.

The case was thus: Some quakers were indicted for a riot, and the Court directed the jury, if they believed the evidence, to find the prisoners guilty; for that the fact sworn against them was in law a riot: which because they refused to do, and gave their verdict against the direction of the Court in matter of law, they committed them. They were afterwards discharged upon a *habeas corpus*. And one of them brings this action for the wrongful commitment.

MAYNARD, *Serjeant*, moved for the defendants, That they might have longer time to plead; for a rule had been made, that the defendants should plead the first day of this Term.

THE COURT declared their opinions against the action, *viz.* That no action will lie against a Judge for a wrongful commitment, any more than for an erroneous judgment.

1. Ld. Ray. 263. 468. 2. Ld. Ray. 767. 2. Will. 155. 2. Bl. R. p. 1145.

MONDAL

Trinity Term, 26. Car. 2. In C. B.

MONDAY, the Secondary, told the Court, that giving the defendants time to plead countenanced the action, but granting immunities did not. So they had a special imparlance till Michael-Term next.

HAMOND  
against  
HOWELL.

1. Term Rep.  
493.

TKINS, Justice. It was never imagined, that Justices of and terminer and gaol-delivery would be questioned in proceedings for what they should do in execution of their office: if law had been taken so, the statute of 7. Jac. c. 5. for pleading the general issue (a) would have included them as well as inferior officers.

(a) See also 24. Geo. 2. c. 44. and 2. Hawk. P. C. ch. 8. s. 42.

\* Birch against Lake.

[ 185 ]

Case 16.

PROHIBITION was granted to the spiritual court upon this suggestion: That SIR EDWARD LAKE, vicar-general, had lie to the spiritual court the plaintiff *ex officio* to appear and answer to divers articles. The COURT said, that the citation *ex officio* was in use, when the citation *ex officio* was on foot: but that is ousted by the 17. Eliz. c. (a). to answer articles. *ex officio* were allowed, they might cite whole counties out presentment; which would become a trick to get money. Ante, 119. 184. the party grieved can have no action against the vicar-general, 10. Mod. 349. g a Judge, and having jurisdiction of the cause, though he 1. Ld. Ray. 263. 468. make his power. *Per quod*, &c. 2. Ld. Ray. 767.

See also 16. Car. 1. c. 11. and 13. Car. 2. st. 1. c. 12. 3. Bl. Com. 101. 447.

Prattle against King.

Case 17.

USBAND and Wife, administrators in the right of the wife, bring an action of debt against husband and wife, administrators likewise in the right of the wife, *de bonis non*, &c. of . The action is for rent incurred in the defendants own time, is brought in the *debet et detinet*. The defendants plead, against the administrators; to which the plaintiffs demurred.

MR. JEANT HARDRES, for the plaintiff, said, The action was brought in the *debet et detinet*, for that nothing is assets but of the term, for profits over and above the value of the rent; and he cited *grave's Case* (a), and the case of *Rich v. Frank* (b), and his own time. S. C. Skin. 5. 120. Though if an executor be plaintiff in an action for S. C. 2. Jones, incurred after the testator's death, he must sue in the *detinet* 160. , because whatever he recovers is assets: but though an executor S. C. 2. Danv. 504.

Eliz. 225. Poph. 120. 5. Co. 31. 1. Vent. 171. 2. Vent. 209. 1. Sid. 266. 1. Lev. 1. Cro. 125. 685. 3. Mod. 327. 8. Mod. 263. 356. 10. Mod. 12. 12. Mod. 7. ill. 4. 5. Com. Dig. 201.

(a) Moor, 566. 5. Co. 31. 1. Brownl. (b) 1. Brownl. 56. 2. Brownl. 203. Godolph. 174. 237. See vide Cro. Jac. 238. 1. Bullst. 22. Godolph. 176. where it is said, that Hargrave's is not law.

ecutor

Trinity Term, 26. Car. 2. In C. B.

**FRATTLER  
against  
KING.**

executor be plaintiff, yet if the lease were made by himself, he must sue in the *debit et detinet*. Then the plea of "*fully administered*" is not a good plea; for he is charged for his own occupation. If this plea were admitted, he might give in evidence payment of debts, &c. for as much as the term is worth, and take the profits to his own use, and the lessor be stripped of his rent: in *Jesselyn's Case (a)*, this plea was ruled to be ill.

\* [ 186 ] And of that opinion THE COURT \* was; and said, That executors could not waive a term (though, if they could, they ought to plead it specially), for it is naturally in them, and *prima facie* is intended to be of more value than the rent (b): if it should fall out to be otherwise, the executors shall not be liable *de bonis propriis*, but must aid themselves by special pleading. For the plea, they said, there was nothing in it: and gave judgment for the plaintiff.

(a) *Stiles*, 49.

(b) *Cro. Jac.* 549.

Case 18.

Buckly against Howard.

To an action of debt on bond against an executor, if the defendant plead, that the testator was indebted to plaintiff upon A STATUTE MERCHANT yet in force, and no assets *ultra*, the plaintiff may reply, that the statute was destroyed by fire.

1. Roll. Abr. 925.  
Stiles, 143.  
1. Brown. 51.  
Doug. 452.

DEBT upon two bonds, the one of twenty pounds, the other of forty pounds, against an administratrix. The defendant pleaded, that the intestate was indebted to the plaintiff in two hundred and fifty pounds, upon A STATUTE MERCHANT; which statute is yet in force, not cancelled nor annulled; and that she has not above forty shillings in assets, besides what will satisfy this STATUTE. The plaintiff replies, that the STATUTE is burnt with fire. The defendant demurs.

By the opinions of WYNDHAM, ATKINS, and ELLIS, *Justices*, the plaintiff had judgment. For the defendant, by his demurrer, had confessed the burning of the statute; which being admitted and agreed upon, it is certain that it can never rise up against the defendant: for the statute of the 23. Hen. 8. c. 6. concerning recognizances in the nature of A STATUTE STAPLE, refers to the statute staple, viz. that like execution shall be had and made, and under such manner and form as is therein provided. THE STATUTE STAPLE 27. Edw. 3. c. 9. refers to the STATUTE MERCHANT 13. Edw. 1. st. 3. c. 1.; and that to the statute of *Alton Burnel* 11. Edw. 1. c. which provides, that "if it be found by the Roll, and by the Bill, that the debt was acknowledged, and that the day of payment is expired, that then, &c." But if the statute be burnt, it cannot appear that the day of payment is expired; and consequently there can be no execution. If the recognissee will take his action upon it, he must say, *hic in carid prolatâ*. 15. Hen. 7. pl. 16.

VAUGHAN, *Chief Justice*, differed in opinion. He said, FIRST, That it is a rule in law, that matter of record shall not be avoided by matter *in pais*; which rule is manifestly thwarted by this resolution. He said, it was a matter of record to both parties; and the

Trinity Term, 26. Car. 2. In C. B.

the plaintiff could not avoid it by such a plea, any more than the defendant could avoid it by any other matter of fact. He cited \* a case, where the obligee voluntarily gave up his bond to the obligor, and took it from him again by force, and put it in suit: the defendant pleaded this special matter, and the Court would not allow it; but said, he might bring his action of trespass. **SECONDLY**, Suppose the defendant had taken issue upon the statute's being burnt, and it had been found to have been burnt, and yet had been found afterwards, the defendant could not have any benefit of this verdict. He said it was a proper case for equity.

BUCKLEY  
against  
HOWARD.

\* [ 187 ]  
Co. Lit. 226.  
Post. 216.

2. Vern. 299.

Slater against Carew.

Case 19.

**DEBT UPON A BOND.** The condition was, That if the obligor, his heirs, executors, &c. do yearly, and every year, pay or cause to be paid to *Thomas* and *Dorothy* his wife, during their two lives, that then, &c. The husband dies; and the question was, Whether or no the payment should continue to the wife?

A bond to pay an annuity to a man and his wife during their two lives becomes extinct on the death of either of them.

**BALDWIN**, *Serjeant*, argued, that the money is payable during their lives, and the longer liver of them: he cited *Brudnel's Case* (a), and *Hill's Case* (b), that whenever an interest is secured for lives, it is for the lives of them, and the longer liver of them.

1. Leon. 74. 103.  
1. And. 151.  
161.

**SEYSE**, *contra*. The interest of this bond is in the obligee; the husband and wife are strangers, and therefore the payment ceaseth upon the death of either of them.

11. Co. 3. b.  
Owen, 52.  
1. Roll. Abr. 832.  
Raym. 126.  
Palm. 74. 102.

**THE WHOLE COURT** was of this opinion; and grounded themselves upon that distinction in *Brudnel's Case*, betwixt where the *cestui que vies* have an interest, and the cases of collateral limitations. They said also, that in some cases an interest would not survive, as if an office were granted to two, and one of them died, unless there were words of survivorship in the grant. So the plaintiff was barred.

1. Vent. 163.  
2. Vent. 74. 108.  
1. Brownl. 46.  
2. Brownl. 43.  
9. Mod. 157.  
10. Mod. 163.  
11. Mod. 108.  
Cas. Temp.  
Talb. 143.

2. Ld. Ray. 1199. 1203. 1460. 2. Peer. Wms. 102. 280. 331. 347. 529. 3. Peer. Wms. 1184. 158. 405. 408.

(a) 5. Co. 9. and Co. Litt. (b) Easter Term, 4. Jac. 1. Roll 112.  
219. b. Warburton's Reports.

# MICHAELMAS TERM,

The Twenty-Sixth of Charles the Second,



I N

The Common Pleas.

*Sir John Vaughan, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* [ 188 ]

Case 20.

*Farrer against Brooks, Administrators of Brooks.*

If a defendant die after execution awarded, and before it is served, yet the writ binds the goods in the hands of his administrator; but in favour of purchasers no writ of execution shall bind the property, but from the time of its delivery to the sheriff.

THE PLAINTIFF had judgment in debt against *John Brooks* the intestate, and took out a *fieri facias*, bearing *teste* the last day of *Trinity Term*, *de bonis et catallis* of *John Brooks*: before the execution of the writ *John Brooks* dies, and *Elizabeth Brooks* administers: the sheriff's bailiff executes the writ upon the intestate's goods in her hands.

BALDWIN, *Serjeant*, moved the Court for restitution, for that a *fieri facias* is a commission, and must be strictly pursued. Now the words of the writ are, "*de bonis of John Brooks*;" and by his death they cease to be his goods. The plaintiff will be at no prejudice; the goods will still remain liable to the judgment; only let the execution be renewed by *scire facias*, to which the administratrix may plead somewhat.

WYNDHAM, *Justice*. The property of the goods is so bound by the *teste* of the writ, as that a sale made of them *bona fide* shall

8. Co. 171.

2. Vent. 218.

Comb. 33. 7. Mod. 195. 12. Mod. 130. 241. 1. Ld. Ray. 695. 2. Ld. Ray. 808. 850. 1071.

3. Peer. Wms. 399. The like point was adjudged in *Dapin v. Cartwright*, B. R. Hilary Term,

12. Geo. 2.

be

Michaelmas Term, 26. Car. 2. In C. B.

be avoided (a); which is a stronger case. And since the intestate himself could not have any plea, why should we take care that the administrator should have time to plead?

FARRER  
against  
BROOKS.

And of that opinion was ALL THE COURT, after they had advised with the Judges of the king's bench, who informed them that their practice was accordingly.—But VAUGHAN, *Chief Justice*, said, That, in his opinion, it was clearly against the rules of the law.—But they said there were cases to this purpose in *Cro. Car. Roll. Moore, &c.*

(a) But now by 29. Car. 2. c. 3. f. 16. "No writ of *ieri facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said

"time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same), indorse upon the back thereof the day of the month and year whereon he or they receive the same."—See 2. Burr. 953. and the case of *Hutchinson v. Johnston*, 1. Term Rep. 729.

\* [ 189 ]

\* Lisee against Saltingstone.

Case 21.

**EJECTMENT.** The case upon a special verdict was thus : A devise "to Sir Richard Saltingstone being seised in fee of *Rees-Farm*, on the seventeenth day of *February*, in the nineteenth year of the king, made his will in writing, in which were these words, "ITEM, For *Rees-Farm* (in such a place), I will and bequeath it to my wife, during her natural life; and by her to be disposed of to such of my children as she shall think fit." Sir Richard died; his wife entered, and sealed such a writing as this, viz. "Omnibus Christi fidelibus, &c. Noveritis, That whereas my husband, Sir Richard Saltingstone, &c." reciting that clause in the will, "I do dispose the same in manner following; that is to say, I dispose it, after my decease, to my son *Philip*, and his heirs for ever." The wife died, and *Philip* entered, and died, and left the lessor of the plaintiff his son and heir.

A devise "to my wife for life, and by her to be disposed of to such of my children as she shall think fit," gives the wife an estate during her life, with a power to dispose of the estate to any of their children in fee.

The question was, What estate *Philip* took? or, What estate the testator intended should pass out of him?

S. C. 1. Freeman. 149. 163. 176. S.C.2. Lev. 104. S.C. Carter, 232.

SCROGGS, *Serjeant*, in last *Easter Term*, and BALDWIN, *Serjeant*, in last *Trinity Term*, argued this case for the plaintiff; and they insisted upon the word "dispose," That when a man deviseth his land to be disposed by a stranger, it has been always held to be a bequeathing of a fee-simple, or at least a power to dispose of the fee-simple; and they cited *Weston v. Wells* (a); but they chiefly relied on the case of *Daniel v. Uply* (b).

Jones, 137. Latch. 40. 939. Cro. Eliz. 16. 160.

WALLER, *Serjeant*, in *Easter Term*, and NEWDIGATE, *Serjeant*, in *Trinity Term*, argued for the defendant, That the

3. Leon. 71. 1. Vern. 66. 2. Vern. 80. 376. 513. 10. Mod. 71. 1. Ld. Ray. 204. 1. Salk. 240. 2. Will. 6.

(a) Year-Book 19. Hen. 3. pl. 10. Moor. 57. Dyer, 98. b. in Marg. (b) Latch. 9. 39. 134. Noy, 80. 1. Jones, 137. W. Benloe, 178.

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O

heir

Michaelmas Term, 26. Car. 2. In C. B.

LIEFE  
against  
SALTING-  
STONE.

heir at law ought not to be disinherited without very express words (a). That if the devisor himself had said in his will, "I dispose of *Rees-Farm* to *Philip*," that *Philip* would have had no more than an estate for life; and what reason is there that the disposal, being limited to another, should carry a larger interest than if it had been executed by the testator himself?

This Term it was argued at the bench, and by the judgments of ELLIS, WYNDHAM, and ATKINS, *Justices*, the plaintiff had judgment. They agreed, that the wife took by the will an estate for her own life, with a power to dispose of the fee. She cannot take a larger estate to herself by implication than an estate for life; because an estate for life is given to her by express \* limitation: \* [ 190 ] *Whiting v. Wilkins* (b). For cases resembling the case in question were cited, 7. *Edw. 6. Brook. tit. "Devise"* 39. 1. *Leon. 159.* and *Daniel v. Uply* (c); and *Clayton's Case* (d). It is objected, That in *Daniel v. Uply* there are these words, "at her will and pleasure;" to which they answered, That if she have a power to dispose according to her discretion, it is as she herself pleaseth; and then *Expressio eorum quæ tacite insunt, nihil operatur*. If I devise that J. S. shall sell my land, he shall sell the inheritance (e). Where the devisor gives to another a power to dispose, he gives to that person the same power that himself had.

VAUGHAN, *Chief Justice*, differed in opinion. He said, It is plain that the word "dispose" does not signify *to give*; for if so, then it is evident that the lessor of the plaintiff cannot have any title: for if the wife were to give, then were the estate to pass out of her; which could not be by such an *appointment* as she makes here, but must be by a legal conveyance. Besides, she cannot give what she has not, and she has but an estate for life. If then it does not signify *to give*, what does it signify? Let us a little turn the words, and a plain certain signification will appear. "I will and bequeath *Rees-Farm* to such of my children as my wife shall think fit, at her disposal:" at this rate the wife does but nominate what person shall take by the will. This is a plain case, and free from uncertainty and ambiguity, which else the word "dispose" will be liable to.

But judgment was given for the plaintiff (f).

- (a) See *Denn v. Gaskin*, Cowp. 661.
- (b) 1. Bulst. 219.
- (c) W. Jones, 137. Noy, 80. Latch. 11. 39. 135.
- (d) 5. Co. 1.
- (e) *Keilway*, 43, 44. 19. Hen. 8. 50. 9.
- (f) See the case of *Tomlinson v. Deighton*, 1. Peer. Wms. 149. in point, and S. C. Salk. 239. 10. Mod. 31. Comyns Rep. 194. and 2. Eq. Caf. Abr. 309. where it is also held, that the subsequent marriage of the widow is not a suspension of such a power, Finch, 346.; for the power is simply collateral to the estate, and the *essence* *que* *use* of the power does not derive any interest from the donee of the power; she being in such case a mere instrument to carry the intent of the donor of the power into execution. Jones, 137. Noy, 80. Latch. 11. 39. 135. Powel on Powers, 31. 3. Ark. 712. 1. Term Rep. 43. 435. 2. Brown's Chan. Cases, 21. 344. 588. 3. Brown's Chan. Cases, 95. 243. 310.

Howell

Michaelmas Term, 26. Car. 2. In C. B.

Howell *against* King.

Case 22.

**T**RESPASS, for driving cattle over the plaintiff's ground. The case was, *A.* has a way over *B.*'s ground to *Black-Acre*, and drives his beasts over *B.*'s ground to *Black-Acre*, and then to another place lying beyond *Black-Acre*. And, Whether this was lawful or no? was the question, upon a demurrer.

If *A.* has a way from *B.* to *C.* and occupies lands beyond *C.* he cannot justify using the way to those lands.

It was urged, That when his beasts were at *Black-Acre*, he might drive them whither he would.

39. Hen. 6. pl. 6.  
Bro. Ab. 136. b.  
pl. 6.

On the other side it was said, That by this means the defendant might purchase a hundred \* or a thousand acres adjoining to *Black-Acre*, to which he prescribes to have a way; by which means the plaintiff would lose the benefit of his land: and that a *prescription* presupposed a *grant*, and ought to be continued according to the intent of its original creation.

\* [ 191 ]  
1. Ro. Ab. 391.  
1. Vent. 48.  
10. Mod. 228.  
300.  
Lutw. 113.  
1. Ld. Ray. 75.  
Bull. N. P. 74.  
1. Term Rep.  
560.

THE WHOLE COURT agreed to this.—And judgment was given for the plaintiff.

Warren *Qui Tam*, &c. *against* Sayre.

Case 23.

**T**HE COURT agreed in this case, That an *information* for not coming to church may be brought upon the statute of 23. *Eliz.* c. 1. f. 5. only, reciting the clause in it that has reference to the 1. *Eliz.* c. 2.; and that this is the best and surest way of declaring.

Information may be brought on 23. *Eliz.* c. 1.  
Cro. *Eliz.* 750.  
Cro. Jac. 142.  
1. Leon. 5.

*Allen*, 49. 2. *Show.* 237. 340. 8. *Mod.* 43. 381. 11. *Mod.* 114. 2. *Str.* 843. 1066. 1193.  
1. *Str.* 602. 2. *Hale*, 165. 2. *Hawk. P. C.* 358.

# HILARY TERM,

The Twenty-Sixth and Twenty-Seventh of Charles  
the Second,

I N

The Common Pleas.

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* [ 192 ]

Case 24.

\* Williamfon against Hancock.

*Hilary Term, 24. & 25. Car. 2. Roll 679.*

*A.* being tenant for life, remainder to his son *B.* in tail, remainder to his own right heirs, levies a fine with warranty to the use of *C.* in fee. On the death of the tenant for life, this warranty descending on the son will bar his entry as remainder-man in tail, notwithstanding the conveyance of the fine comes in by way of use; for the conveyance, or his heir, or his assignee, may plead the deed with the warranty is bar to an ejectment for the land. —S. C. 2. Mod. 14. S. C. 3. Keb. 408. S. C. 1. Freem. 162. 182. Ante, 181. Co. Lit. 215. Cro. Car. 370. 10. Mod. 3, 4. 142. 12. Mod. 512. Vaugh. 360. 3. Com. Dig. "Garranty,"

**T**ENANT for life, the remainder in tail. The tenant for life levies a fine to *J. S.* and his heirs, to the use of himself for years, and after to the use of *Hannah* and *Susan Prinne* and their heirs, if such a sum of money were unpaid by the conusor; and if the money were paid, then to the use of the conusor and his heirs: and this fine was with general warranty. The tenant for life died, the money unpaid, and the warranty descended upon the remainder-man in tail.

The

## Hilary Term, 26. & 27. Car. 2. In C. B.

The question was, Whether the remainder-man were bound by this warranty or not (a)? WILLIAMSON  
against  
HANCOCK.

MAYNARD, *Serjeant*, argued, That because the estate of the and is transferred *in the post* before the warranty attaches in the remainder-man, that therefore it should be no bar. He agreed that a man who comes in by the limitation of an use shall be an *assignee* within the 32. Hen. 8. c. 34. by an equitable construction of the statute, because he comes in by the limitation of the party, and not purely by act in law; but the present case is upon a collateral warranty, which is a positive law, and a thing so remote from solid reason and equity, that it is not to be stretched beyond the maxim: that the *cestuy que use* in this case shall not vouch is confessed on all hands, and there is the same reason why he should not rebut. He said, the resolution mentioned in *Lincoln College Case* (b) was not in the case, nor could be: the warranty there was a particular warranty *contra tunc Abbatem Westmonasteriensem et successores suos*, which abbey was dissolved long before that case came in question. He said, that JONES, *Justice*, upon the arguing the case of *Spirit v. Bence* (c), reported *Cro. Car.* said, that he had been present at the judgment in *Lincoln College Case* (d), and that there was no such resolution as is there reported. 3. Term Rep. 395.

BALDWIN, *Serjeant*, argued on the other side, That at the common law many persons might rebut who could not take advantage of a warranty by way of voucher; as the lord by escheat, the lord of a villain, a stranger, tenant in possession (e): *a fortiori*, he said, he that is in by the limitation of an use, being in by the act of the party (though the law co-operate with it to perfect the assurance), shall rebut.

THE COURT was of opinion, that the *cestuy que use* might rebut; that though voucher lies in privity, an abator or intruder might rebut (f). As to SERJEANT MAYNARD's objection, that he is *in the post*, they said, they had adjudged lately in the case of *Fowle v. Doble* (g), that a *cestuy que use* might rebut; so it was held in *Spirit v. Bence* (h), and in *Kendal v. Fox* (i):

(a) By 4. Ann. c. 16. s. 21. "All warranties made by any tenant for life of any lands, tenements, or hereditaments, the same descending or coming to any person in remainder or reversion, shall be void and of none effect.—And all collateral warranties of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in the same, shall be void against his heir."—"By this statute," says Mr. JUSTICE BLACKSTONE, "it should seem that the Legislature meant to allow, that the collateral warranty of tenant in tail, descending, though without assents,

"upon a remainder-man or reversioner, should still bar the remainder or reversion." 2. Bl. Com. 303. See also Co. Lit. 373.; and Mr. Butler's note (a) Co. Lit. 373. b.

(b) 3. Co. 62.

(c) Cro. Car. 368.

(d) 3. Co. 62, 63.

(e) 35. Aff. pl. 9. 11. Aff. pl. 3. 45. Edw. 3. 18. 42. Edw. 3. 19. 3. Co. 62. 63.

(f) F. N. B. 135. Co. Lit. 385.

(g) Ante, 181.

(h) Cro. Car. 368.

(i) Jones, 199.

Hilary Term, 26. & 27. Car. 2. In C. B.

WILLIAMSON  
against  
HANCOCK.

that report in *Lincoln College Case*, whether there were any resolution in the case or no, is founded upon so good reason, that conveyances since have gone according to it.

ATKYNs, *Justice*, said, There was a difficult clause in the statute of Uses, 27. Hen. 8. c. 10. s. 14. viz. "That all and singular person and persons, and bodies politick which at any time on this side the first day of May which shall be in the year of our Lord 1536, &c. shall have any estate unto them executed of and in any lands, tenements, or hereditaments by the authority of this act, shall and may have and take the same or like advantage, benefit, voucher, aid prayer, remedy, commodity, and profit by action, entry, condition, or otherwise, to all intents, constructions, and purposes as the person or persons seised to their use of or in any such lands, tenements, or hereditaments so executed, had, should, might, or ought to have had at the time of the execution of the estate thereof, by the authority of this act, against any other person or persons of or for any waste, disseisin, trespass, condition broken, or any other offence, cause, or thing concerning or touching the said lands or tenements so executed by the authority of this act." By this clause they that came in by the limitation of an use before that day, were to have the like advantages by voucher or rebutter, as if they had been within the degrees. If the parliament thought it reasonable, Why was it limited to that time? Certainly the makers of that law intended to destroy uses utterly, and that there should not be for the future any conveyances to uses; but they supposed that it would be some small time before all people would take notice of the statute, and make their conveyances accordingly; and that might be the reason of this clause: but since, contrary to their expectations, uses are continued, he could easily be satisfied, he said, that *cestuy que use* should rebut.

Moor, 859.  
H. n. 27.  
Cro. Car. 370,  
371.

WYNNDHAM, *Justice*, was of opinion, that *cestuy que use* might vouch: he said, there was no authority against it, but only opinions *obiter*.

THE COURT all agreed for the defendant; and judgment was given accordingly.

\* [ 194 ]

Case 25. \* Rogers against Davenant, Parson of Whitechapel.

The spiritual court may, by excommunication, compel parishioners to repair the church; and when the vestry have made a

NORTH, *Chief Justice*. The spiritual court may compel parishioners to repair their parish-church if it be out of repair, and may excommunicate every one of them till it be repaired; and those that are willing to contribute must be absolved, till the greater part of them agree to assess a tax; but the Court cannot assess them towards it. It is like to a bridge or a highway; a *distingas* shall issue against the inhabitants to make them

rate for that purpose may enforce the payment of it.—Ante, 79. Post, 236. 2. Mod. 2. 222. 159. 5 Co. 63. 67. 1. Vent. 367. 308. F. N. B. 50. 2. Inst. 489. Poph. 197. 2. Roll. Abr. 289. 311. Fort. 346. 2. Ld. Ray. 1390.

repair

## Hilary Term, 26. & 27. Car. 2. In C. B.

repair it, but neither the king's court, nor the justices of peace, can impose a tax for it.

ROGERS  
against  
DAVENANT.

WYNDHAM, ATKYNS, and ELLIS, *Justices*, accorded, the churchwardens cannot, none but a parliament can impose a tax; but the greater part of the parish can make a bye-law: and to this purpose they are a corporation. But if a tax be illegally imposed, as by a commission from the bishop to the parson, and some of the parishioners, to assess a tax; yet if it be assented to, and confirmed by the major part of the parishioners, they in the spiritual court may proceed to excommunicate those that refuse to pay it.

See the statute *Circumspecte agatis*, 13. Edw. 1. stat. 4. c. 1.

## Compton and his Wife *against* Ireland.

Case 26.

*Michaelmas Term, 26. Car. 2. Roll 691.*

**SCIRE FACIAS** by the plaintiffs as executors to have execution of a judgment obtained by their testator, *unde executio adhuc restat faciend.*

To a *scire facias* by executors, on a judgment by testators, the defendant cannot plead a caption on a *ca. sa.* and that he paid the debt to the gaoler; for a discharge on such a payment is an escape.

The defendant confesseth the judgment, but says, that a *capias ad satisfaciendum* issued against him; upon which he was taken, and was in the custody of the warden of THE FLEET; and that he paid the sum mentioned in the condemnation to the warden of THE FLEET, who suffered him to go at large. The plaintiff demurred.

THE COURT held this to be no plea, but that it was a voluntary escape in the warden; and judgment was given for the plaintiff.

1. Roll. Abr. 902. 1. Cro. 328. 206. 307. 351. 1. Mod. 215. 366. 10. Mod. 206. 307. 351. 12. Mod. 230. 385. 541. 1. Ld. Raym. 399. 3. Peer. Wms. 36. 148.

\* [ 105 ]

## \* Haley's Case.

Case 27.

**PER CURIAM.** If a *habeas corpus* be directed to an inferior court, returnable two days after the end of the Term, yet the inferior court cannot proceed contrary to the writ of *habeas corpus*.

Proceedings after *habeas corpus* delivered are erroneous, altho' the writ was not returnable till after the Term.

NORTH, *Chief Justice*, cited the case of *Staples*, steward of *Windsor*; who hardly escaped a commitment, because he had proceeded after a *habeas corpus* delivered to him (though the value were under five pounds) (*a*), and would not make a return of it.

3. Mod. 85. 6. Mod. 177. 12. Mod. 666. 1. Salk. 148. Tidd's Prac. 176. 178. 2. Burr. Rep. 758. Ante, 28. Cro. Car. 261. T. Jones, 209.

(a) See the 21. Jac. 1. c. 23. f. 4. 12. Geo. 1. c. 29. f. 3. 19. Geo. 3. c. 70.

Hilary Term, 26. & 27. Car. 2. In C. B.

Cafe 28. The King *against* the Bishop of Rochester and Sir Francis Clerke.

Hilary Term, 24. & 25. Car. 2. Roll 594.

The king being seised of a manor to which an advowson is appendant, and which were before held by an abbot, grants the manor, without the advowson, to a bishop, who regrants both the manor and advowson to the king. A grant afterwards made by the king of the manor, with the appurtenances, naming the advowson, and describing the whole as formerly belonging to

the abbot, and lately to the bishop, passes the advowson.—S. C. 2. Mod. 1. S. C. 3. Keb. 412. 1. Roll. Rep. 23. 1. Co. 24. 6. Co. 56. Hob. 129. Cro. Eliz. 632. Yelv. 45. Cro. Jac. 34. 297. 302. Lane, 75. 8. Co. 166. 5. Mod. 297. 1. Ld. Ray. 50. 297. 302.

THE CASE, UPON A SPECIAL VERDICT, was thus :—The king being seised in fee of the manor of *Leyborn*, in the county of *Kent*, to which the advowson of the church of *Leyborn* is appendant (which manor came to him by the dissolution of monasteries, having been part of the possessions of the *Abbot of Gray-church*), granted the manor to the *Archbishop of Canterbury*, and his successors, saving the advowson: afterward the king presents to the church, being void, *J. S.* The *Archbishop of Canterbury* grants the manor, and the advowson, to the king, his heirs and successors; which grant is confirmed by the dean and chapter. The king grants the manor with the appurtenances, and this advowson (naming it in particular), “ which lately did belong to the *Archbishop of Canterbury*, and to the *Abbot of Gray-church*, together with all privileges, profits, commodities, &c. in as ample manner as they came to the king’s hand by the grant of the archbishop, or by colour or pretence of any grant from the archbishop, or confirmation of the dean and chapter, or by surrender of the late *Abbot of Gray-church*, or as amply as they are now, or at any time were in our hands, to *Sir Edward North*, and his heirs, &c.”

\* [ 196 ] The question was, Whether or no, by this \* grant, the advowson passed?

NEWDIGATE, *Serjeant*. The king is not apprised of his title, and therefore the grant is void (a): for he thought this advowson came to him by grant from the archbishop (b). If the king be deceived in deed, or in law, his grant is void (c).

(c) Bro. “ Patents,” 104. 1. Co. 46. 51, 52. 10. Co. Arthur Legat’s Case. Hob. 170. 223, 229, 230. 223. 245. 323. Dyer, 124. Moor, 888. 2. Co. 33. 11. Co. 90. 9. Hen. 6. 28. b. 2. Roll. 186. Co. Ent. 384.

HARDRES, *Serjeant, contra*. He laid down four grounds or rules, whereby to construe the king’s letters patents :—FIRST, Where a particular certainty precedes, it shall not be destroyed by an uncertainty, or a mistake coming after (d).—SECONDLY, There is a difference when the king mistakes his title to the prejudice of his tenure or profit, and when he is mistaken only in some description of his grant, which is but supplemental, and not material nor issuable (e).—THIRDLY, Distinct words of relation,

(d) Cro. Car. 34. 48. Yelv. 42. 3. Leon. 162. 1. And. 148. 29. Edw. 3. pl. 71. b.

10. Hen. 4. pl. 2. Godh. 423. Markham’s Case, cited in Arthur Legat’s Case, 10. Rep.—(e) 21. Edw. 4. pl. 49. 33. Hen. 7. pl. 6. 36. Hen. 8. pl. 1. and 38. Hen. 6. pl. 37. 9. Edw. 4. pl. 11, 12. Lane, 111. 2. Co. 54. 1. Bulstr. 4.

## Hilary Term, 26. & 27. Car. 2. In C. B.

in the king's grant, are good to pass away any thing (a).—  
FOURTHLY, When the king's grants are upon a valuable consideration, they shall be construed favourably for the patentee, for the honour of the king (b). Then he applied all these rules to the case in question, and prayed judgment.

THE KING  
against  
THE BISHOP  
OF ROCHESTER,  
&c.

MAYNARD, *Serjeant*, argued afterwards against the passing of the advowson. He said, those two descriptions of the advowson, viz. "belonging lately to the *Archbishop of Canterbury*," and "formerly to the *Abbot of Gray-church*," are coupled together with a conjunctive "et," so that both must be true. So here is a falsity in the first and material part of the grant, viz. the description of the thing granted. Though the advowson of *Leyborn* be named, yet it is so named, as to be capable of a generality; for there may be more advowsons than one belonging to that manor. This falsity goes to the title of the church. No subsequent words will aid this mis-recital; for the description of the thing granted ends there. The following words, "*adeo plenè, &c.*" and whatever comes after, do but set out how fully and amply he should enjoy the thing granted; and being no part of its description, cannot enlarge it or make it more certain.

(a) Dyer, 350.  
9. Co. 24.  
10. Co. 4.  
(b) 18. Edw. 2.  
"De Quo  
"Warranto."  
2. Inst. 446,  
447.  
6. Co. Sir John  
Molyn's Case.  
10. Co. 65. a.

8. Hen. 4. pl. 2.

\* [ 197 ]

TURNER, *Serjeant*, *contra*, cited the books named in the margin (c).

(c) Bacon's  
Elements, 96.

The case of the Queen v. Lewis, 1. Leon. 129. *Veritas nominis tollit errorem demonstrationis*. 29. Edw. 3. pl. 7, 8. 1. And. 148. Plowd. 192. 2. Co. 32. Poph. 60. 10. Co. 113. 19. Edw. 3. Fitz. "Grants," 58. 10. Hen. 4. pl. 2. Sir John L'Estrange's Case. Markham's Case, 10. Co. in Arthur Legat's Case. Cro. Car. 548. Ann Needler's Case, in Hob. 9. Hen. 6. pl. 12. Bro. "Annuity," 3. Baker v. Bacon, Cro. Jac. 48. and Bozoun's Case, 4. Rep. 6. Co. 7. Cro. Jac. 34. 1. Leon. 119, 120. 2. Roll. "Prerog. le Roy," 200. 8. Co. 167. 21. Edw. 4. pl. 46. 8. Co. 56. Roll. "Prerog." 201. 10. Co. 64. 9. Co. the Earl of Salop's Case. Co. Lit. 121. b. Moor, 421. 2. Roll. 125.

THE COURT, this Term, gave their judgment, that the advowson did well pass. In this grant there are as large words, and the same words that are in *Whistler's Case* (d), and the king is not here deceived, neither in the value nor in his title. And judgment was given accordingly.

(d) 10. Co. 63.  
1. Ro. Rep. 62.  
1. Ro. Ab. 185.  
292. 350.

## Furnis against Waterhouse.

Case 29.

A SUPERSEDEAS was moved for, to stay proceedings upon a return of the summons was not after summons, according to the statute of 31. Eliz. c. 3. the words of which statute are, "that after every summons upon the land, in any real action, fourteen days notice, at the least, before the day of the return thereof, proclamations of the summons shall be made on a Sunday, &c. at or near the most usual door of the churches or chapel of that town or parish where the land, whereupon the summons was made, doth lie, and that proclamation, so made, shall be returned together with the names of the summoners."

The grand cape shall be superseded, if the return of the summons be contrary to 31. Eliz. c. 3. Post. 248. Jones, 7. 6. Mod. 4. 1. Lev. 105. 1. Salk. 216, 217.

SECONDLY,

Hilary Term, 26. & 27. Car. 2. In C. B.

FURNIS  
against  
WATERHOUSE.

SECONDLY, The land lieth in a vill called *Heriock*, and the return is of a proclamation of summons at the parish-church of *Halifax*; and it does not appear that the land lies within that parish.

THIRDLY, The return is, "*proclamari feci secundum formam statuti*:" and it is not returned to have been made upon the land: *Hob. 33. Allen v. Walter*.

THE COURT. These were all held erroneous; and the *grand cape* was superfeded.

EASTER

# E A S T E R T E R M,

The Twenty-Seventh of Charles the Second,

I N

The Common Pleas.

Wednesday, April 21, 1675.

Sir Francis North, *Knt. Chief Justice.*

Sir Robert Atkins, *Knt.*

Sir Hugh Wyndham, *Knt.*

Sir William Ellis, *Knt.*

} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

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Naylor *against* Sharply, and other Coroners of the  
County-Palatine of Lancaster.

\* [ 198 ]  
Case 30.

A MAN brings an action of *debt* against B. sheriff of the county-palatine of *Lancaster*, and sues him to an out-lawry upon *mesne process*, and has a *capias* directed to "the chancellor of the county-palatine," who makes a precept to the coroners of the county, being six in all, to take his body, and have him before the king's justices of the court of common pleas, at *Westminster*, such a day. One of the coroners being in sight of the defendant, and having a fair opportunity to arrest him, doth it not; but they all return *non est inventus*, though he were easy to be found, and might have been taken every day. Hereupon the plaintiff brings an action on the case against the coroners, and lays his action in *Middlesex*; and has a verdict of one hundred pounds.

If, on a *capias* to the county palatine of *Lancaster*, the chancellor direct his precept to the six coroners of the county, an action on a false return of *non est inventus* will lie against the six jointly, although only one of them omitted to make the arrest. — *Sed*

*quære*, In what county it must be brought. — S. C. Freem. 191. S. C. 2. Mod. 23. Ants. 37. Hob. 209. Cro. Jac. 533. 8. Mod. 226. 239. 380. 10. Mod. 54. 69. 308. 12. Mod. 71. 322. 349. 371. 408. 494. Comyns, 555. 1. Ld. Ray. 178. 258. 1. Stra. 313. 2. Stra. 7012. 2. Term Rep. 238.

BALDWIN,

Easter Term, 27. Car. 2. In C. B.

NAYLOR  
against  
SHARPLY  
AND OTHERS.

BALDWIN, *Serjeant*, moved in arrest of judgment, That the action ought to have been brought in *Lancaster*. He agreed to the cases put in *Bulwer's Case (a)*, where the cause of action arises equally in two counties; but here all that the coroners do, sub- sists and determines in the county-palatine of *Lancaster*; for they make a return to the chancery of the county-palatine only, and it is he that makes the return to the Court. He insisted upon the case of *Husse v. Gibbs (b)*. SECONDLY, He said this action is grounded upon two wrongs; one, the not arresting him when he was in sight; the other, for returning *non est inventus*, when he might easily have been taken: now for the wrong of one, all are charged, and entire damages given. He said, two sheriffs make but one officer, but the case of coroners is different: each of them is responsible for himself only, and not for his companion.

\* [ 199 ] TURNER, *Serjeant*, and PEMBERTON, *contra*. \* They said, the action was well brought in *Middlesex*, because the plaintiff's damage arose here, *viz.* by not having the body here at the day. They cited *Bulwer's Case (c)*; and *Dyer* 159. b. The chancery returns to the Court the same answer that the coroners return to him, so that their false return is the cause of prejudice that accrues to the plaintiff here. The ground of this action is the return of *non est inventus*, which is the act of them all. That one of them saw him, and might have arrested him, and that the defendant was daily to be found, &c. are but mentioned as arguments to prove the false return. And they conceived an action would not lie against one coroner, no more than against one sheriff in *London, York, Norwich, &c.* But to the first exception taken by BALDWIN, they said, Admitting the action laid in another county than where it ought, yet after verdict it is aided by the statute of 16. & 17. Car. 2. c. 8. s. 1. "if the *venire* come from any place of the "county where the action is laid (*d*)."  
It is not said, "in any place of the county where the cause of action ariseth." Now this action is laid in *Middlesex*; and so the trial by a *Middlesex* jury good, let the cause of action arise where it will.

See 1. Freem.  
410. 437.

THE COURT. That statute doth not help your case; for it is to be intended when the action is laid in the proper county, where it ought to be laid, which the words "proper county" imply. But they inclined to give judgment for the plaintiff upon the reasons given by TURNER and PEMBERTON.—*Adjournatur (e)*.

(a) 7. Co. 1.

(b) *Dyer*, 38.

(c) 7. Co. 1. Jenk. 311. 4. Leon. 52.

(d) But either party, notwithstanding this statute, was at liberty to object to the default of hundredors; and therefore it is directed by 4. & 5. Ann. c. 16,

that every *venire facias* shall be awarded from the body of the county in which the action is triable.—See also 1. Jac. 1. c. 13. and 24. Geo. 2. c. 18.

(e) Judgment was given for the plaintiff. 8. C. 1. Freem. 191. See also 8. C. 2. Mod. 24.

Easter Term, 27. Car. 2. In C. B.

Keen *against* Kirby.

Cafe 31.

**IT** was resolved in this case by THE WHOLE COURT, FIRST, That if there be tenant for life, the remainder for life, of a copyhold, and the remainder-man for life enter upon the tenant for life in possession, and make a surrender, that nothing at all passeth hereby; for by his entry he is a disseisor; and has no customary estate in him, whereof to make a surrender.

If a copyholder in remainder enter upon the tenant for life he is a disseisor, and his surrender of the estate is void.

1. Roll. Abr. 504. 3. Leon. 221. S. C. Freem. 192. S. C. 2. Mod. 32. S. C. Carter, 237. 2. Danv. 199. 205. 4. Co. 32. 9. Co. 107. Cro. Car. 205. 1. Sid. 360. 1. Saund. 149. 2. Mod. 352. 11. Mod. 18. 53. 68. 94. 12. Mod. 123. 378. 1. Ld. Ray. 630. 2. Ld. Ray. 1000. 1145. Prec. in Ch. 568. 1. Stra. 452. 1. Peer. Wms. 16. 280. 330. 443. 781. 3. Peer. Wms. 9. 96. 283. 322. 358. See *Faulkner v. Morfe*, 3. Term Rep. 365.

**SECONDLY**, That when tenant for life of a copyhold suffers a \* [ 200 ] recovery as tenant in fee, that this is no \* forfeiture of his estate; for the freehold not being concerned, and it being in a court-baron, where there is no estoppel, and the lord that is to take advantage of it, if it be a forfeiture, being party to it, it is not to be referred to the forfeiture of a free-tenant: That customary estates have not such accidental qualities as estates at common-law have, unless by special custom.

If a copyholder for life suffer a recovery in the court baron, as tenant of the fee, yet this is no forfeiture of the estate.

1. Roll. Abr. 508. Moor, 753. Co. Lit. 59. 4. Co. 23. 2. 2. Mod. 33. 1. Term Rep. 738.

**THIRDLY**, That if it were a forfeiture, of this, and all other forfeitures committed by copyholders, the lord only, and not any of those in remainder, ought to take advantage.—And they gave judgment accordingly.

If a copyholder for life commit forfeiture, the lord, and not he in remainder,

shall take advantage of it.—1. Roll. Abr. 500. 9. Co. 107. 1. Saund. 151. 2. Mod. 33. 2. Jones. 189. 3. Lev. 94. Pollex. 620. Lutw. 803. 3. Term Rep. 162.

**NORTH**, Chief Justice, said, That where it is said in the case of *King v. Loder*, Cro. Car. 204, 205. that when tenant for life of a copyhold surrenders, &c. that no use is left in him, but whosoever is afterward admitted comes in under the lord; that that is to be understood of copyholds in such manors where the custom warrants only customary estates for life, and is not applicable to copyholds granted for life with a remainder in fee. *Note*.

2. Roll. Abr. 462.

Anonymous.

Cafe 32.

**A WRIT** OF ANNUITY was brought upon a prescription against the rector of the parish-church of *St. Peter* in, &c. The defendant pleads, that the church is overflown with the sea, &c. The plaintiff demurs.

An annuity lies, by prescription, against the parson of a church; and it is no plea to say, that the church is destroyed; for it

**NEWDIGATE**, Serjeant, for the plaintiff. The declaration is good; for a writ of annuity lies upon a prescription against a parson due in respect of the profits which arise from the tithe and glebe.—Co. Lit. 144. 344. 1. Roll. Abr. 226. 2. Bulst. 149. Poph. 87. Cro. Eliz. 810. Co. Ent. 49. 2. 2. Leon. 13.

son,

Easter Term, 27. Car. 2. In C. B.

**ANONYMOUS.** son, but not against an heir: *F. N. B.* 152. *Rastall* 32. The plea of the church being drowned, is not good: at best it is no more than if he had said, that part of the glebe was drowned. It is not the building of the church, nor the consecrated ground, in respect whereof the parson is charged, but the profits of the tithes and the glebe. Though the church be down, one may be presented to the rectory: 21. *Hen. 7. pl. 1.* 10. *Hen. 7. pl. 13.* 16. *Hen. 7. pl. 9.* and *Lutterel's Case*, 4. *Co.* 86.

**WILMOT, contra.** The parson is charged as parson of the church of *St. Peter*: we plead in effect, that there is no such church, \*and he confesseth it (*a*). We plead, That the church is *submersa, obruta, &c.* which is as much a dissolution of the rectory, as the death of all the monks is a dissolution of an abbathy. It may be objected, that the defendant has admitted himself rector by pleading to it. But I answer, **FIRST**, An estoppel is not taken notice of, unless relied on in pleading.—**SECONDLY**, The plaintiff by his demurrer has confessed the fact of our plea; by which means the matter is set at large, though we were estopped.

**THE COURT** was clearly of opinion for the plaintiff. The church is the cure of souls (*b*), and the right of tithes. If the material fabrick of the parish-church be down, another may be built, and ought to be.—Judgment was given for the plaintiff.

(*a*) 21. *Edw. 4. pl. 83.*  
*Bro. Abr. s. 1. Edw. 4. pl. 20.*  
*11. Hen. 7. pl. 49.*

(*b*) *The Year-Book 4. Edw. 3. pl. 27.*  
*Hobart, 153.*  
*Moor, 900.* 1. *Roll's Rep. 451.* anciently severable. *Selden's History of Tithes, cap. 6. §. cap. 10. 2.*

# TRINITY 'TERM,

The Twenty-Seventh of Charles the Second,

I N

The Common Pleas.

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

Vaughan *against* Atwood and Others.

\* [ 202 ]

Cafe 33.

**T**RESPASS for taking away some flesh-meat from the plaintiff, being a butcher. The defendants justify by virtue of a custom of the manor of, &c. That the homage used to choose every year two surveyors, to take care that no unwholesome victuals were sold within the precinct of that manor; and that they were sworn to execute their office truly for the space of a year; and that they had power to destroy whatever corrupt victuals they found exposed to sale; and that the defendants, being chosen surveyors, and sworn to execute the office truly, examining the plaintiff's meat (who was also a butcher), found a side of beef corrupt and unwholesome, and that therefore they took it away and burnt it, *prout eis bene licuit, &c.*—The plaintiff demurs.

*A custom to chuse two surveyors to take care that no unwholesome victuals are sold within the precincts of a manor, with power to destroy whatever corrupt victuals they find exposed to sale, is good.*  
S. C. 2. Mod. 56.

**NORTH, Chief Justice.** This is a case of great consequence, and seems doubtful. It were hard to disallow the custom, because the design of it seems to be for the preservation of men's health: and to allow it, were to give men too great a power of seizing and destroying other men's goods. There is an ale-taster appointed  
8. Mod. 297. 11. Mod. 68. 98. 145. 161. 168. 2. Ld. Ray. 1163. Com. Dig. "Copyhold" (i. 6.). 1. Term Rep. 124.

Ante, 37. 85.  
2. Danv. 431.  
Cro. Jac. 555.  
Palm. 211.  
Raym. 232.  
1. Lev. 96.

at

Trinity Term, 27. Car. 2. In C. B.

VAUGHAN  
against  
ATWOOD  
AND OTHERS.

at leets; but all his office is, to make presentment at the leet, if he find it not according to the assise.

WYNDHAM, ATKINS, and ELLIS, *Justices*. It is a good reasonable custom: it is to prevent evil, and laws for *prevention* are better than laws for *punishment*. As for the great power that it seems to allow to these surveyors, it is at their own peril, if they destroy any victuals that are not really corrupt; for in an action, if they justify by virtue of the custom, the plaintiff may take issue, that the victuals were not corrupt. But here the plaintiff has confessed it by the demurrer.

ATKINS, *Justice*, said, If the surveyors were not responsible, the homage that put them in must answer for them, according to the rule of *respondet superior*.—Judgment was given for the plaintiff, unless, &c. (a).

(a) Judgment was given for the defendants; for the Court held it to be a good custom. S. C. 2. Mod. 56.

\* [ 203 ]  
Case 34.

\* Threadneedle against Lynham.

Trinity Term, 23. Car. 2. Roll 622.

If two manors have been usually let for sixty pounds a-year, and the bishop grant a lease of one of them only, reserving thereon the whole rent, yet this lease is good; for the

1. *Eliz.* c. 19.

f. 6. says, that the old accustomed rent, or more, shall be reserved.—S. C. 2. Mod. 57. S. C. Pollenf. 176. S. C. 1. Freem. 92. 119. 165. 179. S. C. 3. Kcb. 192. 372. 583. 595 Co. Lit. 44. 5. Co. 5. 1. Cro. 95. 2. Mod. 57. 3. Mod. 249. 5. Mod. 244. 12. Mod. 249 Ld. Ray. 267. 2. Stra. 1201. 2. Salk. 537. Prec. Ch. 124. 1. Peer. Wms. 655. 3. *Bus Abr.* 364. Dougl. 565. 573.

EJECTMENT. UPON A SPECIAL VERDICT, the case was thus: The jury found, that the lands in the declaration are, and time out of mind had been, parcel of the demesnes of the manor of *Burniel*, in the county of *Cornwall*; which manor consists of demesnes, viz. copyhold tenements demisable for one, two, or three lives, and services of divers freehold tenants: that within the manor of *Burniel* there is another manor called *Trecaer*, consisting likewise of copyholds and freeholds; and that the *Bishop of Exeter* held both these manors in the right of his bishoprick. Then they find the statute of 1. *Eliz.* c. 19. f. 6. *in hæc verba* (a).

(a) By 1. *Eliz.* c. 19. f. 6. "All gifts, grants, feoffments, fines, or other conveyance or estates had, made, done, or suffered, by any archbishop or bishop, of any honors, castles, manors, lands, tenements, or other hereditaments, being parcel of the possessions of his archbishoprick or bishoprick, or united, appertaining, or belonging to any the same archbishopricks or bishopricks, to any person or persons, bodies politic or corporate, other than to THE QUEEN, her heirs or successors, whereby any estate or

estates should or may pass from the same archbishops or bishops, or any of them, other than for the term of twenty-one years, or three lives, from such time as any such lease, grant, or assurance, shall begin, and whereas the old accustomed yearly rent, or more, shall be reserved and payable yearly during the said term of twenty-one years, or three lives, shall be utterly void, and of none effect, all intents, constructions, and purposes."

They

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They find, that the old accustomed yearly rent, which used to be reserved upon a demise of these two manors, was 67l. 1s. 5d. Then they find, that *Joseph Hall, Bishop of Exeter*, demised these two manors to one *Prowse* for ninety-nine years, determinable upon three lives, reserving the old and accustomed rent of 67l. 1s. 5d.: that *Prowse*, living the *cestuy que vies*, assigned over to *James Prowse* the demesnes of the manor of *Trecaer*, for a certain sum: that afterwards he assigned over all his interest, in both manors, to *Mr. Nofworthy*, excepting the demesnes of *Trecaer*, then in the possession of *James Prowse*: that *Mr. Nofworthy*, when two of the lives were expired, for a sum of money, by him paid to the *Bishop of Exeter*, surrendered into his hands both the said manors, excepting what was in the possession of *James Prowse*; and that the bishop (*Joseph Hall's* successor) re-demised to him the said manors, excepting the demesnes of *Trecaer*, and excepting one messuage in the occupation of *Robert Mitchell*; and excepting one farm, parcel of the manor of *Burniel*, for three lives, reserving 67l. 1s. 5d. with the *nomine pœnæ*.

THREAD-  
NEEDLE  
against  
LYNHAM.

The question was, Whether this second lease was a good lease, and the 67l. 1s. 5d. the old and accustomed rent, within the intention of the statute of 1. Eliz. c. 19. s. 6.?

After several arguments at the bar, it was argued at the bench, in *Michaelmas Term*, in the 26. Car. 2. And the Court was divided, viz. VAUGHAN and ELLIS, against the lease; ATKINS and WYNDHAM for it.

NORTH, *Chief Justice*, now delivered his opinion, in which he agreed with ATKINS and WYNDHAM; so that \* judgment was \* [ 204 ] given in maintenance of the lease; and the judgment was affirmed in the king's bench upon a writ of error. See Pollexfen's Rep. 180.

The Chapter of the Collegiate }  
Church of Southwell, } Plaintiffs,

Cafe 35.

against

The Bishop of Lincoln, and }  
J. S. Incumbent, } Defendants.

**Q**UARE IMPEDIT. The incumbent's title was under a grant made by the plaintiffs, who were seised of the advowson *ut de uno grosso*, in the right of their church, of the next avoidance, one *Esco* being then incumbent of their presentation, to *Edward King*, from whom, by mesne assignments, it came to *Elizabeth Bley*, who after the death of *Esco* presented the defendant. Upon a demurrer these points came in question:

*avoidance*, it is void *ab initio*; for otherwise, as there is no dean on whose death it might determine, it would be good for ever.—S. C. 2. Mod. 56. Post. 230. 248. 253. Ante, 38. 6. Co. 25. Hardres, 356. Leon. 308. 3. Co. 60. Co. Lit. 45. 325. 341. 8. Mod. 61. 1. Pter. Wms. 655. Dougl. 573.

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P

FIRST,

Trinity Term, 27. Car. 2. In C. B.

THE CHAPTER  
OF  
SOUTHWELL  
against  
THE Bp.  
OF LINCOLN.

FIRST, Whether the grantors were within the statute of the 13. *Eliz.* c. 10. which enacts, "that all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having either spiritual or ecclesiastical living, of any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapel, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, other than for the term of one and twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent, or more, shall be reserved, and payable yearly during the said term, shall be utterly void and of none effect, to all intents, constructions, and purposes?"

SECONDLY, Whether a grant of a *next avoidance* be restrained by the statute?

THIRDLY, If the grant be void, Whether it be void *ab initio*, or when it becomes so?

FOURTHLY, Whether the statute of the 13. *Eliz.* c. 10. shall be taken to be a *general law*? for it is not pleaded.

JONES, *Serjeant*, for THE FIRST POINT, argued, That the grantors are within the statute: the words are "dean and chapter," which, he said, might well be taken severally; for of this *chapter* there is no *dean*. If they were to be taken jointly, then a dean were not within this law in respect of those possessions which he holds in the right of his deanry: but the subsequent general words do certainly include them; and would extend even to bishops, but that they are superior to all that are expressed by name.

THE SECOND POINT. He said, the statute restrains all gifts, grants, &c. other than such upon which the old rent is reserved, &c. He cited the case of the *Dean of Hereford v. Ballard* (a), 5. Co. the case of *Ecclesiastical Persons* (b), and the *Earl of Salisbury's Case* (c).

THE THIRD POINT. He held it void *ab initio*; it must be so, or good for ever; for here is no dean, after whose death it may become void; as \* *Hunt v. Singleton* (d): the chapter in our case never dies.

THE FOURTH POINT. He argued, That it is a *general law*, because it concerns all the clergy: *Holland's Case* (e), and *Dunpor's Case* (f).

(a) Cro. Eliz. 440. 5. Co. 15.

(b) 5. Co. 14. a.

(c) 10. Co. 60. 5. Co. 3.

(d) Cro. Eliz. 473. 564. 3. Co. 60. Co. Ent. 484.

(e) 4. Co. 75. Cro. Eliz. 601.

2. Roll. Abr. 359. Moor, 541.

(f) 4. Co. 120. b. Cro. Eliz. 815.

WILMOTS,

Trinity Term, 27. Car. 2. In C. B.

WILLMOTE, *contra*.

NORTH, *Chief Justice*, ATKINS, WYNDHAM, and ELLIS, *Justices*, all agreed upon the three points, as SERJEANT JONES had argued.

THE CHAPTER  
OF  
SOUTHWELL  
against  
THE Bp.  
OF LINCOLN.

ATKINS, *Justice*, doubted whether the 13. *Eliz.* c. 10. were a general law, or not; but was over-ruled.

They all agreed, that the action should have been brought against *the patron*, as well as against *the ordinary* and *the incumbent*; but that being only a plea in *abatement*, the defendant has waived the benefit thereof by pleading in *bar*. And judgment was given for the plaintiff, *nisi causa, &c.*

ATKINS said, he thought the case of *Hunt v. Singleton* a hard case; considering, that the dean and the chapter were all persons capable; that a grant should hold in force as long as the dean lived, and determine then. He thought, they being a corporation aggregate of persons who were all capable, that there was no difference betwixt that case and this.

ELLIS said, That in *Lloyd v. Gregory* (a), reported in *Jones*, it was made a point; and that JONES, in his argument, denied the case of *Hunt v. Singleton* (b). He said, that himself and SIR ROWLAND WAINSCOTT reported it, and that nothing was said of that point; but that LORD COKE followed the report of BRIDGEMAN, who was three or four years their *pursuer*, and that he mistook the case.

(a) 1. Jones, 405. Cro. Car. 502. (b) Cro. Eliz. 473. 564. 3. Co. 60.

Milward against Ingram.

Case 36.

THE PLAINTIFF declares in an action on the case upon a *quantum meruit* for forty shillings, and upon an *indebitatus assumpsit* for forty shillings likewise. The defendant acknowledged the promises; but further says, that the plaintiff and he accounted together for divers sums of money; and that upon the foot of the account, the defendant was found to be indebted to the plaintiff in three shillings, and that the plaintiff, in consideration that the defendant promised to pay him those three shillings, discharged him of all demands. The plaintiff demurred.

To an action on the case upon a *quantum meruit* and an *indebitatus assumpsit* the defendant may plead *infirmal computassent*; and that in consideration of paying the value the plaintiff promised to

THE COURT gave judgment against \* the demurrer:—FIRST, They held, that if two men, being mutually indebted to each other, do account together, and the one is found in arrear so much, and \* [ 206 ]

discharge him of all demands.—S. C. 2. Mod. 43. S. C. 1. Freem. 195. S. C. Sayer, 241. Post. 210. 262. Raym. 449. 2. Jones, 158. Cro. Jac. 620. Cro. Car. 384. 2. Leon. 214. 1. Sid. 177. 293. 3. Lev. 238. Ray. 42. 12. Mod. 517. 537. Fitzg. 202. Comyns, 98. 2. Ld. Ray. 235. 664. 680. 1. Cum. Dig. "Assumpsit" (G.).

Trinity Term, 27. Car. 2. In C. B.

MILWARD  
against  
DECHAM.

there be an exprefs agreement to pay the sum found to be in arrear, and each to stand discharged of all other demands; that this is a good discharge in law, and the parties cannot resort to the original contracts. But NORTH, *Chief Justice*, said, If there were but one debt betwixt them, entering into an account for that would not determine the contract.—SECONDLY, They held also, that any promise might well be discharged by parol, but not after it is broken, for then it is a debt.

Cafe 37.

Jones against Wait.

A recovery of lands lying within a liberty is good, altho' they lie in two distinct towns within the liberty.

S.C. 2. Mod. 47. under the name of Lever v. Hoſier.  
Poſt. 250.  
1. Vent. 52.  
143. 170.  
2. Vent. 31.  
Froom. 241.  
Cro. Jac. 574.  
Cro. Car. 263.  
3. Com. Dig. 346.  
2. Bac. Ab. 544.  
Cruise on Fines, 125.  
Cruise on Recov. 270.  
2. Will. 116.  
Cowp. 351.

**EJECTMENT.**—*Shrewsbury* and *Cotton* are towns adjoining: *Sir Samuel Jones* is tenant in tail of lands in both towns: *Shrewsbury* and *Cotton* are both within the liberties of the town of *Shrewsbury*. *Sir Samuel Jones* suffers a common recovery of all his lands in both villis; but the *præcipe* was of two messuages and closes thereunto belonging (these were in *Shrewsbury*), and of, &c. (mentioning those in *Cotton*) lying and being in the vill of *Shrewsbury*, and the liberties thereof.

The question was, Whether by this recovery the lands lying in *Cotton*, which is a distinct vill of itself, not named in the recovery, pass or not?

SERJEANT JONES argued against the recovery, and he cited the cases of *Monk v. Butler* (a), and *Fadeley v. Easton* (b). The writ of covenant, he said, upon which a fine is levied, is a personal action; but a common recovery is a real action, and the land itself demanded in the *præcipe*. There is no precedent, he said, of such a recovery. He cited the case of *Baker v. Johnson* (c), which, he said, was a case in point, and resolved for him.

But THE COURT were all of opinion, That the lands in *Cotton* passed; and gave judgment accordingly.—ELLIS, *Justice*, said, If the recovery were erroneous, at least they ought to allow of it till it were reversed.

(a) Cro. Jac. 574. 2. Roll. Rep. 146. 175.

(b) Cro. Car. 269. 276. Godb. 440. 1. Jones, 301.

(c) Hutton, 206.

\* [ 207 ]

Cafe 38.

\* Lampen against Kedgewin.

If judgment be given against a plaintiff, upon the insufficiency of his declaration,

**A**N ACTION in the nature of a conspiracy was brought by the plaintiff against the defendant; in which the declaration was insufficient. The defendant pleaded an ill plea, but judgment was given against the plaintiff upon the insufficiency of the declaration, the defendant cannot plead this judgment to a second action for the same cause, although the entry be a *nil capiat* instead of an *est sine die*.—S. C. 2. Mod. 42. Cro. Jac. 284. Brownl. 81. 8. Cr. 62. 1. Cro. 545. 12. Mod. 91. 104. 307. 316. 2. Will. 113. 3. Will. 240.

declaration; .

Trinity Term, 27. Car. 2. In C. B.

declaration; which ought to have been entered, "*quod defen-  
dens eat inde sine die;*" but by mistake, or out of design, it  
was entered, *quia placitum prædictum, in formâ prædictâ supe-  
rius placitat. materiaque in eodem contenta, bonum et sufficiens  
in lege existit, &c. ideo consideratum est per Cur. quod quer.  
nil capiat per billam.*" The plaintiff brings a new action,  
and declares right. The defendant pleads the judgment in the  
former action, and recites the record *verbatim* as it was; to  
which the plaintiff demurred. And judgment was given for the  
plaintiff, *nisi causa, &c.*

LAMPEN  
against  
KEDGEWIN.

NORTH, *Chief Justice.* There is no question but that if a  
man mistake his declaration, and the defendant demur, the  
plaintiff may set it right in a second action: but here it is objected,  
that the judgment is given upon the defendant's plea. Suppose  
a declaration be faulty, and the defendant take no advantage of  
it, but pleads a plea in bar, and the plaintiff takes issue, and the  
right of the matter is found for the defendant; I hold, that in  
this case the plaintiff shall never bring his action about again;  
for he is *estopped* by the verdict: or suppose such a plaintiff demur  
to the plea in bar; there by his demurrer he confesseth the fact,  
if well pleaded, and this *estops* him as much as a verdict would:  
but if the plea were not good, then there is no estoppel. And  
we must take notice of the defendant's plea; for upon the matter,  
as that falls out to be good or otherwise, the second action will  
be maintainable or not.—THE OTHER JUDGES agreed with him  
*in omnibus.*

Mutt. 81.  
Cro. Car. 35.  
Stile, 201.  
1. Bl. Rep. 309.  
2. Bl. Rep. 831.  
3. Will. 309.  
1. Cromp. Prac.  
184.

The record in this case cannot be found. Vide case of Sherborn v. Stapleton,  
H. C. P. 13. Geo. 3. n. 136.

\* [ 208 ]

\* Prince against Rowson, Executor of Atkinson.

Case 39.

THE plaintiff declares against the defendant as executor. The defendant pleads, That the testator made his will, and  
that he the defendant, *suscepto super se onere testamenti prædicti.*  
&c. did pay divers sums of money due upon specialties, and that  
there was a debt owing by the testator to the defendant's wife;  
and that he retained so much of the testator's goods as to satisfy  
that debt, and that he had no other assets.

A defendant ex-  
ecutor must  
shew, that he is  
rightful execu-  
tor, to intitle  
him to retain  
a debt due to  
his wife; for  
otherwise he  
shall be intended  
an executor  
*de son tort.*

The plaintiff demurred, Because for aught that appears the de-  
fendant is an executor *de son tort*, and then he cannot retain for  
his own debt: the plaintiff naming him in his declaration "ex-  
ecutor of the testament of, &c." will not make for him, for  
that he does of necessity; he cannot declare against him any  
other way.

S. C. 2. Mod. 51.  
5. Co. 30.  
Yelv. 127.  
12. Mod. 441.  
471.  
10. Mod. 406.  
2. Stra. 1106.  
1. Peer. Wms.  
752. 766.  
3. P. Wms. 189  
349. 351. 370  
2. Term Rep.  
97. 597.  
3. Ter. Rep. 48.

And of that opinion was ALL THE COURT, *viz.* that he ought  
to entitle himself to the executorship, that it may appear to the  
Court that he is such a person as may retain.—And accordingly  
judgment was given for the plaintiff.

See the 30. Car. 2. c. 7. made perpetual by 4. & 5. Will. & Mary, c. 24.

# HILARY TERM,

Twenty-Seventh and Twenty-Eighth of Charles  
the Second,

I N

## The Common Pleas.

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* [ 209 ]

Cafe 40.

\* *Smith against Tracy.*

Children of the  
half blood shall  
share under the  
statute of distri-  
butions, 22. &  
23. Car. 2.  
c. 10. with  
children of  
the whole blood.

S. C. 2. Mod.  
204.

S. C. 1. Eq.

A MAN dies, leaving issue by two several *venters*, viz. by the first three sons, and by the second two daughters. One of the sons dies intestate; the elder of the two surviving brothers takes out administration; and SIR LIONEL JENKINS, Judge of the prerogative court, would compel the administrator to make distribution to the sisters of the half-blood. He prayed a prohibition:—but it was denied, upon advice by ALL THE JUDGES; for that the sister of the half-blood, being 2-kin to the intestate, and not *in remotiori gradu* than the brother of the whole blood, must be accounted in equal degree.

See 21. Hen. 8. c. 5. f. 3. 22. & 23. Car. 2. c. 10. 29. Car. 2. c. 3. and the 1. Jac. 2. c. 17.

*Anonymous*

Anonymous.

Case 41.

**A**N ACTION was brought against four men, viz. two attorneys and two solicitors, for being attorneys and solicitors in a cause against the plaintiff in an inferior court, *falso et malitiose* knowing that there was no cause of action against him: and also, for that they sued the plaintiff in another court, knowing that he was an attorney of the common-pleas, and privileged there.

An action for malicious prosecution will not lie against one attorney for suing another in an inferior court, or for suing on the retainer of a client, although he knew there was no cause of action.

**PER TOTAM CURIAM.** There is no cause of action. For put the case as strong as you will: Suppose a man be retained as an attorney to sue for a debt which he knows to be released, and that himself were a witness to the release; yet the Court held, that the action would not lie; for that what he does, is only as servant to another, and in the way of his calling and profession. And for suing an attorney in an inferior court; that (they said) was no cause of action: for who knows, whether he will insist upon his privilege or not? And if he does, he may plead it, and have it allowed.

1. Roll. Rep. 408.

\* [ 210 ]

2. Mod. 306.

5. Mod. 349.

405.

6. Mod. 30. 90. 137. 169. 185. 261. 10. Mod. 41. 45. 263. 12. Mod. 4. Prec. in Ch. 149. 3. Peer. Wms. 104. 2. Bl. Rep. 869.

Fits and Another against Freestone.

Case 42.

**I**N AN ACTION grounded upon a promise in law, payment before the action brought is allowed to be given in evidence upon non assumpsit. But where the action is grounded upon a special promise, there payment, or any other legal discharge, must be pleaded. An implied promise it may be given in evidence on the general issue.—Ante, 206. March. 100. Allen, 29. Comyns, 373. 6. Mod. 131.—Per HOLT, Chief Justice. There is no such thing as a promise in law. But see the case of Bedford v. Clarke, 2. Sid. 236. and Gilbert's Law of Evidence, Lofft's edit. 385. 404. Strange, 648. 1. Com. Dig. "Assumpsit" (H 8.). Bull. N. P. 129. 145.

On a special promise the defence must be pleaded; but on an implied promise it may be given in evidence on the general issue.—Ante, 206. March. 100. Allen, 29. Comyns, 373. 6. Mod. 131.—Per HOLT, Chief Justice. There is no such thing as a promise in law. But see the case of Bedford v. Clarke, 2. Sid. 236. and Gilbert's Law of Evidence, Lofft's edit. 385. 404. Strange, 648. 1. Com. Dig. "Assumpsit" (H 8.). Bull. N. P. 129. 145.

Bringloe against Morrice.

Case 43.

**T**RESPASS FOR IMMODERATELY RIDING THE PLAINTIFF'S MARE. The defendant pleaded, That the plaintiff lent to him the said mare, *et licentiam dedit eidem* upon the said mare; and that by virtue of this licence the defendant and his servant *alternatim* had rid upon the mare. The plaintiff demurs.

If A. lend his horse to B. to ride to a particular place, B. cannot give licence to another to ride; but if he hire the horse, he may let another ride it.

**SERJEANT SKIPWITH, for the plaintiff.** The licence is personal and incommunicable; as 12. Hen. 7. pl. 25. 13. Hen. 7. pl. 13.; the Duchess of Norfolk's Case, 18. Edw. 4. pl. 14.

S. C. 3. Salk. 271.

**SERJEANT NEWDIGATE, contra.** This licence is given by the party, and not created by law, wherefore no trespass lieth: 8. Co. 146, 147.

2. Stra. 787. 2. Ld. Ray. 795. 913. 916. 2. Term Rep. 166.

**THE COURT.** The licence is annexed to the person, and cannot be communicated to another: for this riding is matter of pleasure.—NORTH, Chief Justice, took a difference, where a certain

Hilary Term, 27. & 28. Car. 2. In C. B.

BRINGLOE  
against  
MORRICA.

tain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse is lent, hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was taken betwixt *hiring* a horse to go to York, and *borrowing* a horse: in the first place the party may set his servant up; in the second not (a).

(a) The objection was, that the defendant pleaded licence for the taking, but gave no answer to the immoderate riding; and the Court adjudged the plea good; *the taking* being the *gist*, and the *riding* only aggravation of the trespass. S. C. 3. Salk. 271.

TRINITY

# E A S T E R T E R M,

The Twenty-Eighth of Charles the Second,

I N

The Common Pleas.

*Sir Francis North, Knt. Chief Justice,*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* Brook *against* Sir William Turner.

\* [ 211 ]  
Case 44.

**A**MAN, upon marriage, covenanted with his wife's relations to let her make a will of such and such goods: she made a will accordingly by her husband's consent, and died. After her death her will being brought to the prerogative court to be proved, a prohibition was prayed by the husband upon this suggestion, That the testatrix was *femina viro cooperta*, and so disabled by the law to make a will.—*PER CURIAM*. Let a prohibition go, *nisi causa, &c.*

**NORTH, Chief Justice.** When a question arises concerning the jurisdiction of the spiritual court, as, Whether they ought to have the probate of such a will? Whether such a disposition of a personal estate be a will, or not? Whether such a will ought to be proved before a *peculiar*, or before *the ordinary*? Whether by the archbishop of one province, or another, or both? and, prohibit the prerogative court from granting a probate.—*S. C.* 2. *Mod.* 170. *S. C.* 3. *Keble* 624. *Hitz. "Devise"* 28. 1. *Roll. Abr.* 608. *Cro. Eliz.* 27. *Cro. Car.* 219. 376. 2. *Danv.* 518. *Moer*, 339. 1. *And.* 92. 1. *Roll. Abr.* 912. *Hob.* 17. *N. Lutw.* 10. 11. *Mod.* 221. 1. *Vern.* 244. 408. 2. *Vern.* 329. *Preced. in Cham.* 44. 84. 255. 2. *Peer. Wms.* 82. *Gillb. Dev.* 12. 2. *Stra.* 891. 1111. 1118. 1. *Salk.* 313. 2. *Bl. Com.* 498.

A wife, by the consent of her husband, may make an appointment in the nature of a will; but the spiritual court cannot try the fact, whether a husband has given his wife such a power; and therefore, on a suggestion that a testatrix was a married woman, the superior courts will pro-

What

Easter Term, 28. Car. 2. In C. B.

BROOK  
against  
SIR WILLIAM  
TURNER.

What shall be *bona notabilia* (a)? in these and the like cases, the common law retains the jurisdiction of determining. There is no question, but that here is a good surmise for a prohibition; to wit, that the woman was a person disabled by the law to make a will: the husband may by covenant depart with his right, and suffer his wife to make a will, but whether he hath done so here or not, shall be determined by the law: we will not leave it to their decision; it is too great an invasion upon the right of the husband. In this case the spiritual court has no jurisdiction at all; they have the probate of wills, but a *feme covert* cannot make a will: if she disposeth of any thing by her husband's consent, the property of what she so disposeth, passeth from him to her legatee, and it is the gift of the husband. If the goods were given into another's hands in trust for the wife, still her will is but a declaration of the trust, and not a will properly so called: but of things in action, and things that a *feme covert* hath as executrix, she may make a will by her husband's consent; and such a will being properly a will in law, ought to be proved in the spiritual court.—In the case in question a prohibition was granted (b).

\* [ 212 ]

(a) Sed vide 10. Mod. 272. and Salk. 547.

(b) See S. C. 2. Mod. 170. where it is said, that the party was ordered to declare in prohibition, and a trial had at the bar of the court. But it seems to be settled, by the case of *Jenkin v. Whitehouse*, 1. Burr. Rep. 431. that the ecclesiastical court has not jurisdiction on the question, Whether a husband has given his wife a power to make an appointment? but that that fact, if disputed, must be ascertained by the common law, and then the ecclesiastical court may grant a probate, or

rather administration with the paper annexed, which creates the appointment; for by the case of *Stone v. Forsyth*, Dougl. 707. it must be proved in the spiritual court before it can be given in evidence. See also *Fettiplace v. Gages*, 3. Brown's Rep. Chan. 8. that when personal property is given to a *feme covert* to her sole and separate use, she may dispose of it by will, without the assent of her husband; but the probate must be produced to justify the payment of the money. *Cochay v. Sydenham*, 2. Brown's Rep. Chan. 391.

Case 45.

— against the Hamburgh Company.

The goods and debts of a CORPORATION are liable to foreign attachment, by the custom of London.

3. C. From. 207.

1. Ro. Ab. 354.

Cro. Eliz. 286.

598.

Carth. 25.

Leach. 208.

9. Bac. Ab. 689.

THE plaintiff brought an action of debt in London against the Hamburgh Company, who not appearing upon summons, and a *nihil* being returned against them, an attachment was granted to attach debts owing to the Company, in the hands of fourteen several persons; by *certiorari* the cause was removed into this court; and, Whether a *procedendo* should be granted, or not? was the question.

GOODFELLOW, BALDWIN, and BARRELL, *Serjeants*, argued, That a debt owing to a corporation is not attachable.

MAYNARD, *Serjeant*, and SCROGGS, *contra*.

THE COURT.—We are not judges of the customs of London, nor do we take upon us to determine, Whether a debt owing to a corporation be within the custom of foreign attachment, or not? This we judge and agree in, that it is not unreasonable that a corporation's

## Easter Term, 28. Car. 2. In C. B.

corporation's debts should be attached: if we had judged the custom unreasonable, we could and would have retained the cause; for we can over-rule a custom, though it be one of the customs of *London* that are confirmed by act of parliament, if it be against natural reason (a). But because in this custom we find no such thing, we will return the cause (b). Let them proceed according to the custom, at their peril. If there be no such custom, they that are aggrieved may take their remedy at law. We do not dread the consequences of it. It does but tend to the advancement of justice.

—  
against  
THE  
HAMBURG  
COMPANY.

By NORTH, *Chief Justice*, WYNDHAM and ELLIS, *Justices*, ATKINS *aberrat*, a *procedendo* was granted accordingly.

(a) The customs of London are confirmed by 9. Hen. 3. c. 9. and the 7. Rich. 2. c. 37.; but this is intended of customs not repugnant to law. 2. Inst. 20. 4. Inst. 250. Cro. Eliz. 689. 1. Sid. 288.

was certified by STARKY, *Recorder*, in the 22d year of Edward the Fourth, 1. Roll. Abr. 554.; and therefore the Court must take notice of it; Dougl. 380. 3. Will. 207. 2. Bl. Rep. 834; but there is no mention that this custom extends to corporations. Cro. Eliz. 186.

(b) The custom of *foreign attachment*

\* Anonymous.

\* [ 213 ]  
Case 46.

**PER CURIAM.** If a man is indicted upon the statute 3. Jac. 1. c. 5. s. 11, 12. of recusancy, conformity is a good plea; but not, if an *action of debt* be brought. Conformity is a good plea to an indictment for recusancy.

Raym. 330. 465. 2. Jones, 187. 1. Roll. 95. 2. Bulst. 324. 2. Show. 331. 8. Mod. 43. 381. 1. Ld. Ray. 243. 1. Hawk. P. C. 30.

## Parten and Bafeden's Case.

Case 47.

**PARTEN** brought an action of debt, in this court, against the testator of *Bafeden*, the now defendant; and had judgment; after whose death, there was a *devastavit* returned against the defendant *Bafeden*, his executor: he appeared to it, and pleaded; and a special verdict was found to this effect:

If a person named in a will executor, before probate, possesses himself of the goods of the testator, pays a debt, converts the residue, and then refuses to take out a probate; an administration granted to the widow, on this refusal, is void; for he continues an executor *de facto*, and is liable in debt to the creditors of the deceased.

The defendant, *Bafeden*, was made executor by his will, and dwelt in the same house in which the testator lived and died; and before probate of the will he possessed himself of the goods of the testator, prized them, inventoried them, and sold part of them, and paid a debt, and converted the value of the residue to his own use; afterwards, before the ordinary he refused, and upon his refusal, administration was committed to the widow of the deceased.

The question was, Whether or no the defendant should be charged to the value of the whole personal estate, or only for as much as he converted?

Vaugh. 182. 12. Mod. 441. 471. 2. Peer. Wms. 145. 3. Peer. Wms. 251. 337. 2. Term Rep. 97. 397. 5. Mod. 136.

BARRELL,

Easter Term, 28. Car. 2. In C. B.

PARTEN AND  
BASEDEN'S  
CASE.

\* [ 214 ]

Flowd. 276.

BARRELL, *Serjeant*, argued, That he ought to be charged for the whole; Because, **FIRST**, He is made executor by the will; and he is thereby compleat executor before probate, to all intents but bringing of actions. **SECONDLY**, He has possession of the goods, and is chargeable in respect of that. **THIRDLY**, He caused some to be sold, and paid a debt; which is a sufficient administration. There is found to discharge him, **FIRST**, His refusal before the ordinary. But that being after he had so far intermeddled, avails nothing: *Hinsloe's Case*, 9. Co. 37. An executor *de sen tort*, he confessed, should not be charged for more than he converted; and shall discharge himself by delivering over the rest to the rightful executor. But the case is \* different of a rightful executor, that has taken upon him the burthen of a will. The second thing found to discharge him, is the granting of administration to another; but that is void, because he is a rightful executor that has administered; in which case the ordinary has no power to grant administration: *Hob. 46. Keble v. Osbaston*. The third thing found to discharge him, is the delivery of the goods over to the administrator; but that will not avail him, for himself became responsible by his having possession, and he cannot discharge himself by delivering the goods over to a stranger, that has nothing to do with them. If it be objected, that by this means two persons will be chargeable in respect of the same goods; I answer, That payment by either discharges both: *Cra. Car. 88. Whitmore v. Porter*.

2. Lev. 55. 90.  
782.  
7. Lev. 157.  
286. 305.  
1. Sid. 280.  
293. 372.  
2. Saund. 148.  
7. Rol. 919. 2.  
Ante, 62.  
2. Stra. 918.  
x Peer. Wms. 8.  
43. 49. 767.

THE COURT was of opinion, That the committing of administration, in this case, is a mere void act. A great inconvenience would ensue, if men were allowed to administer as far as they would themselves, and then to set up a beggarly administrator; they would pay themselves their own debts, and deliver the residue of the estate to one that is worth nothing, and cheat the rest of the creditors. If an administrator bring an action, it is a good plea to say, That the executor made by the will has administered. Accordingly judgment was given for the plaintiff,  
3. Peer. Wms. 183. 251.

Case 48.

Major and Stubbing *against* Birde and Harrison.

A plea in abatement is good, although it contain matter in bar

S.C. Freem. 208.

S. C. 2. Mod. 63. 5. Mod. 131. 146. 6. Mod. 102. 1. Sid. 189. 1. Show. 4. 1. Lev. 317. Moor, 652. 2. Saund. 128. 10. Mod. 112. 192. 8. Mod. 43. 12. Mod. 503. 1. Ld. Ray, 228. 337. 593. 694. 2. Ld. Ray. 1208. 4. Bac. Abr. 501

**R**ESOLVED, That a plea may be a good plea *in abatement*, though it contain matter that goes *in bar*. They relied upon the case in the YEAR BOOK 10. *Hen. 7. fol. 11*, which, they said, was a case in point, and *Salkell v. Skelton*, 2. *Roll. Rep. 64*. And judgment was given accordingly.

# TRINITY TERM,

The Twenty-Eighth of Charles the Second,

I N

The Common Pleas.

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Ellis, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* Anonymous.

\* [ 215 ]  
Case 1.

**N**ORTH, *Chief Justice.* If there are accounts between two merchants, and one of them become bankrupt, the course is not to make the other, who perhaps upon stating the accounts is found indebted to the bankrupt, to pay the whole that originally was intrusted to him, and to put him for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors; but to make him pay that only which appears due to the bankrupt on the foot of the account; A creditor may set off his debt against his bankrupt debtor, and pay over or prove the balance, as it shall happen to be.

Ante, 93.

12. Mod. 446. Fitzg. 182. 2. Vern. 203. 428. Abr. Eq. 55. 2. Ld. Ray. 871. 2. Stra. 995. 1157. 1. Peer. Wms. 238. 2. Peer. Wms. 500. 3. Peer. Wms. 23. 25. 405. 408. 1. Atk. 110.

otherwise

## Trinity Term, 28. Car. 2. In C. B.

**ANONYMOUS** otherwise it will be for accounts betwixt them after the time of the other's becoming bankrupt, if any such were (a).

(a) By the 5. Geo. 2. c. 30. s. 28. "Where it shall appear to the commiss<sup>rs</sup> that there has been mutual credit and mutual debts between the bankrupt and any other person previous to the bankruptcy, one debt may be set against another; and what shall appear to be due on either side, and no more, shall be claimed or paid on either side respectively." And by the 2. Geo. 2. c. 22. and 8. Geo. 2. c. 24. it is enacted, "That when there are mutual debts between a plaintiff or defendant one debt may be set against the other, and either pleaded in bar or given in evidence on the general issue at the trial." It was decided, however, that these statutes could not be pleaded by a debtor to a bankrupt in an action against him by the assignees; for as between them there could not be

mutual debts, because, as the debtor could have no action against the assignees, there were not mutual remedies. *Real v. Larkin*, 1. Will. 155. But in a later case the Court seemed to impeach this decision, as against the general principles of law, justice, and good sense. *Ridout v. Brough*, Cowp. 135.; and it is now held, that a defendant may set off a debt due to him from a bankrupt; for the assignees are to be considered as the bankrupt. 1. Cooke's B. L. 2d edit. 575. See also *Lock v. Bennet*, 2. Atk. 49. 2. Stra. 1334. 1. Atk. 119. 126. 231. 237. 3. Atk. 691. 1. Vezey, 375. 1. Peer. Wms. 326. Dougl. 97. 104. 407. 1. Term Rep. 112. 285. The cases of *French v. Cox*, Cook's B. L. 577. and *Parker v. Carter*, Cooke's B. L. 589. 2. Term Rep. 476. 3. Term Rep. 435. 507.

### Cafe 2.

### Wing against Jackson.

Attraction of  
trespafs on the  
cafe will lie in a  
county court, but  
not trespafs vi et  
armis.

1. Ro. Ab. 543.  
2. Lev. 93.  
3. Hawk. P.C. 5.

**TRESPASS**, *quare vi et armis* the defendant *insultum fecit* upon the plaintiff, was brought in THE COUNTY-COURT; and judgment there given for the plaintiff.—But it was reversed here upon a writ of *false judgment*, because THE COUNTY-COURT, not being a court of record, cannot fine the defendant, as he ought to be if the cause go against him, because of the *vi et armis* in the declaration; but an action of trespafs without those words will lie in the county-court well enough.

\* [ 216 ]

### Cafe 3.

\* Anonymous.

Tithe of cattle  
on waste grounds  
shall be paid to  
the parson of the  
parish in which  
the owner  
dwells.

8. C. 2. Dany.  
592. 604.  
2. Inst. 651.  
Savil, 60.  
Gilb. Eq. Rep.  
229.

**A VICAR** libelled in the spiritual court for tithes of *young cattle*; and furnished, that the defendant was seised of lands in *Middlesex*, of which parish he was vicar, and that the defendant had common in a great waste, called *Sedgemore-Common*, as belonging to his land in *Middlesex*, and put his cattle into the said common. The defendant prayed a *prohibition*, for that the land where the cattle went, was not within the county of *Middlesex*.

FIRST, As for this, no prohibition was granted, because of that clause in 2. & 3. *Edw. 6. c. 13.* whereby it is enacted, "That all and every person which hath or shall have any beasts or other cattle titheable, going, feeding, or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the increase of the said cattle, so going in the said waste or common, to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies of the parish, hamlet, town, or other place where the owner of the said cattle inhabiteth or dwelleth."

The

## Trinity Term, 28. Car. 2. In C. B.

SECONDLY, The same plaintiff libelled against the same defendant for tithes of *willow-saggots*; who suggests, to have a prohibition, the payment of two-pence a year to the rector for all tithes of *willow*.—THE COURT held, that *a modus* to the rector is a good discharge against the vicar.

*A modus to the rector is a good discharge from tithe against the vicar.*

Post. 229. Yelv. 86. Cro. Jac. 116. Winch. 2. 44. 1. Vent. 61. 2. Peer. Wms. 522. 1. Ld. Ray. 242.

Ante, 50. Comyns, 633.

THIRDLY, The same plaintiff libelled also for tithes of *sheep*. The defendant, to have a prohibition, suggests, that he took them in to feed, after the corn was reaped, *pro melioratione agriculturæ infra terras arabiles et non aliter*.—THE COURT held, that the parson ought not to have tithe of *the corn* and *the sheep* too, which make the ground more profitable, and to yield more. *Per quod*, &c.

Sheep fed in stubble-fields solely for the purpose of manuring the land are not titheable.

Poph. 142. 1997 3. Bulst. 238.

2. Peer. Wms. 463. 1. Ld. Ray. 129. 137.

## Ingram against Tothill and Ren.

Case 4.

REPLEVIN. *Trevill* leased to *Ingram* for ninety-nine years, if *Joan Ingram* his wife, *Anthony* and *John Ingram* his sons should so long live, rendering an heriot, or forty shillings to the lessor and his assigns, at the election of the lessor, his heirs and assigns, after their several deaths *successive*, as they are named in the indenture. *Trevill* deviseth the reversion. *John* dies, and then *Joan* dies. The question was, \* Whether or no *a heriot* were due to the devisee upon the death of *Joan*?

In an avowry under a lease for years, if *A. B.* and *C.* should so long live, rendering a heriot, or 40s. after their several deaths, it must be averred, that the parties were alive at the time of the distress.

\* [ 217 ]

S. C. 2. Mod. 93. 281. S. C. 3. Keb. 785. 829. S. C. 1. Vent. 314. S. C. 2. Lev. 210. Ante 63. Co. Lit. 43. 147. 471. Cro. Car. 314. Cro. Eliz. 321. 539. 1. Show. 81. 1. Jones, 300. 1. Sid. 437. 1. Vent. 91. 2. Saund. 164. 1. Lev. 295. N. Lutw. 203. 416. 1. Leon. 2. 3. Co. 2. Plow. 193. 431. 3. Mod. 230. 4. Mod. 321. 6. Mod. 64. 12. Mod. 540. 1. Salk. 356. See the case of *Smartle v. Penhallow*, 2. Ld. Raym. 994. Plowd. 31. Com. Dig. "Pleader" (C 66.).

NORTH, *Chief Justice*. Though *Anthony* were alive, the devisee of *Trevill* could not distrain for the heriot, for that the reservation is to him and his assigns; and although the election to have the heriot of forty shillings be given to the lessor, his heirs or assigns, yet that will not help the fault in the reservation.

A lease reserving a heriot, or 40s. at the election of the lessor and his assigns, determines in his

death.—Co. Lit. 47. Owen, 9. Cro. Eliz. 217. 2. Roll. Abr. 450. 12. Co. 36. 1. Vent. 162. Cro. Car. 290.

ELLIS, *Justice*. There is another fault in the pleading; for it is pleaded that *Trevill* made his will in writing; but it is not said, that he died so seized; for if the estate of the devisor were turned to *a right* at the time of his death, the will could not operate upon it.

Pleading.

Also

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Notice.  
Comp. 30.

Also it is said, That the avowant made his election, and that the plaintiff *habuit notitiam* of his election; but it is not said by whom notice was given.—For these causes, judgment was given for the plaintiff.

*Quere*, If a heriot be given after the death of *A. B.* and *C.* successively, whether it be due if *B.* dies before *A.* and *C.*

It was urged, likewise, against the avowant, That no heriot could be due in this case, because *Joan* did not die first, but the course of succession is interrupted; and that a heriot not being due of common right, the words of reservation ought to be pursued. —But as to this THE COURT delivered no opinion.

Case 5. Ognell against Lord Arlington, Guardian of Sir John Jacob.

Estates held by *elegit* are within the 4. Hen. 7. c. 24.; and if the lands be extended, may be barred by fine and non-claim.

Ante, 4.  
2. Vent. 333.  
2. Show. 36. 40.

2. Skin. 260. 1. Ch. Caf. 268. Gilb. Eq. Rep. 17. 108. 11. Mod. 103. 210. 12. Mod. 32. 2. Vern 189. 368. 662. Abr. Eq. 256. 1. Peer. Wms. 130. 520. 2. Peer. Wms. 127. 146. 3. Peer. Wms. 315. 372. A naked power has been held not to be barred by a fine, because some estate must be devised or gained by wrong to make a fine operate. Willis v. Sherrat, in chancery, 24. February, 1739, reported 1. Atkini, 474.

THE COURT, UPON A TRIAL AT BAR, delivered for law to the jury, That if there be tenant by *elegit* of certain lands, and a fine be levied of those lands, and five years with non-claim pass, the interest of the tenant by *elegit* is bound, according to *Saflin's Case* (a); otherwise, if the land had not been actually extended. Also, That if an inquisition upon an *elegit* be found, and the party before entry has the possession, a fine, with non-claim, shall bar his right; for before actual entry, he may have ejectment or trespass; and so not like to an *interesse termini* (b).

(a) 5. Co. 124. Cro. Jac. 60.  
(b) By 29. Car. 2. c. 3. s. 14. & 15. the day of the month, and the year, in which any judgment is signed in the courts at Westminster, shall be set down on the record, and also be entered on the margin of the roll; and such judgments as against purchasers *bona fide* for valuable considerations, of lands, tenements, or hereditaments, to be charged thereby, shall be

judgments only from the time they are so signed. Also by 4. & 5. Will. & Mary, c. 20. for the greater security of purchasers, all judgments by confession, &c. shall be docketed; and no judgment not docketed shall affect any lands or tenements as to purchasers or mortgages, or have any preference against heirs, executors, or administrators.

\* [ 218 ]

Case 6.

\* Barry against Trebeswycke.

A parson may sue for a pension by prescription, either in the spiritual court or at common law.

If a parson have a pension by prescription, he may either bring an action at the common law, or commence a suit in the spiritual court; but if he bring a writ of annuity at the common law, he can never after sue in the spiritual court, for that his election is determined.

2. Vent. 3. 265. 120. 1. Sid. 146. 1. Keb. 523. 562. Co. Lit. 146. 2. Inst. 491. Cro. Eliz. 675. Cro. Jac. 666. 12. Mod. 260. 397. 416. 1. Peer. Wms. 657. 660. 2. Ld. Ray. 323. 579. 1. Stra. 421.

Wakeman

**QUARE IMPEDIT.** The defendant pleaded a recovery in this manner, viz. That *John Wakeman*, grandfather to the plaintiff, was seised in fee of the manor, to which, &c. and that a *præcipe* was brought against one *Prinne* and *Philpots*, "*ad tunc tenentes liberi tenementi, &c.*" who appeared and vouched *John Wakeman, &c.* and that this recovery was to the use of *J. S.* under whom the defendant claims.

**STRODE, for the defendant.** It is not necessary that the tenant, in a common recovery, should have a freehold, at the time of the purchase of the writ; if he have a freehold at the time of the return, it sufficeth: 7. *Edw. 3. pl. 42.* 7. *Edw. 3. pl. 70. Aff. of Nev. Diff. 43. Edw. 3. pl. 21.* In these authorities the person against whom the *præcipe* is brought, comes in by right, after the purchase, and before the return of the writ. But in 26. *Edw. 3. pl. 68.* there is an example, where the tenant to the *præcipe* comes in by *tort*: but there is this difference; if he come to the land by his own act, be it by right or by wrong, there he makes the writ good: otherwise if he come to it by act of law. 8. *Edw. 3. pl. 22.* 1. *Formedon, 25. Hen. 6. pl. 4.* The reason why you shall not abate the plaintiff's writ by your own act, is, because you cannot give him a better. The demandant here is estopped to say, that there was not a tenant to the *præcipe* in this recovery; for the writ is but abatable, if brought against one that is not tenant: and as long as it stands not abated, but is pleaded to, &c. it shall conclude all that are parties and privies, and all claiming under them: 34. *Edw. 3. Fitz Abr. tit. "Droit," 39.* Here is in our case an \* estoppel, with a recompence. *Wakeman*, the grandfather, who was the first vouchee in this recovery, might have counterpleaded the lien, and extorted the warranty; but having vouched over, he has past that advantage, and is concluded, being made a party by voucher. This being a common recovery, the Court will do all they can to make it good. A fine is levied by *dedimus notestatem* by husband and wife. The commissioners did not return the examination of the wife; and that is the discriminating difference upon which depends, Whether the wife shall be bound by the fine, or not? 15. *Edw. 4. 28. a. Lit. Sect. 670.* 6. *Edw. 3. 22. a.* The Court must needs in this case intend, that *Prinne* and *Philpots* came in by conveyance, because *Wakeman* came in upon the voucher, which he would not have done, if there had not been a lien.—He cited *Lincoln College Case (a)*, *Griffin v. Stanhope (b)*, and *Duncomb v. Wingfield (c)*.

**PEMBERTON** answered, That *tunc tenens* is a sufficient averment in the pleading of a recovery, which is favoured in law; but is not good alone, when in the same sentence a matter is set forth that is inconsistent with it, and plainly contradictory, as in this case.

(a) 3. Co. 48. 2. Ander. 31.

(b) Cro. Jac. 454.

(c) Hob. 254. 2. Roll. Rep. 447. Winch. Ent. 408.

If a common recovery be pleaded, "that A. being seised in fee a præcipe was brought against B. and C. ad tunc tenentes liberi tenementi," or without shewing how they had the freeholds, it is bad. S. C. 2. Mod. 70. Hob. 262. Lutw. 1549. Piggot, 30. Moor, 691. Noy, 126. 3. Co. 59. 1. Show. 347. 12. Mod. 45. 124. 1. Ld. Ray. 202. 229. Co. Litt. 203. b. note (1).

See the case of Lewis v. Witham, Strange, 185. 1. Will. 48.

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WAKEMAN  
against  
BLACKWELL.

And of that opinion was THE COURT. The case of *Duncumb v. Wingfield*, they said, was upon a special verdict; where many things may be intended, which shall not be so in pleading: and in *Lincoln College Case*, the writ is said to be brought against one *Edward Chamberlain* in one part of the record, and the mother is said to be tenant in another part of the record, and by the other party; but here in the same sentence, *uno flatu*, there is a flat contradiction (a).

(a) In S. C. 2. Mod. 70. it is said, not well pleaded, but delivered no judgment. that the Court inclined that it was ment.

Case 8.

Burrow against Haggett.

A FORMEDON  
in descender,  
stating that the  
right descended  
to the demand-  
ant, as brother  
and heir of the  
donee, is good,  
without alledg-  
ing that the  
donee died with-  
out issue.

FORMEDON IN THE DESCENDER. The defendant pleaded in abatement of the count, and took these exceptions:

FIRST, That the demandant declares, that the right descended to him after the death of *Leonard*, as brother and heir to *Leonard*, and son and heir of the donee; but does not alledge that *Leonard* died without issue (a). In ancient Registers (b) the clause is, *et quid* the issue died without issue; \* and in the *Annals of Edward the Fourth* (c) it is said by CATESBY, Justice, That where a man entitles himself as heir, he must shew how he is heir.

\* [ 220 ]

S. C. 2. Mod. 94.  
S. C. 3. Lev. 55.  
Hob. 51.  
Dyer, 216.  
N. Lutw. 304.  
5. Mod. 17.  
10. Mod. 140.  
362. 367.  
2. Ld. Ray. 202.  
See Booth on  
Real Actions,  
155.

SEYSE, contra. The precedents are on our side; and the difference is betwixt a formedon in the descender, and a formedon in the remainder, or reverter. In the former they do not mention the dying without issue of him after whose death they claim; for the count there is in effect only to set out their pedigree; but in a formedon in the remainder, or reverter, it is otherwise: 39. Edw. 3. 27. Old Bk. of Ent. 339. pl. 3. Co. Lit. "Mandevill's Case," 26. b. In the Year Book of 7. Hen. 7. fol. 7. b. our case is put in express terms: the exception taken to the count there by *Keble*, is the same that is taken to ours here; and there it is over-ruled.

NORTH, Chief Justice. I have looked into precedents, and find the count, in this case, according to them. It is a plain and reasonable difference betwixt a formedon in the descender, and a formedon in the remainder, or reverter: nor could the demandant be brother and heir to *Leonard*, if *Leonard* had left children, &c.

Part of the words  
of a writ may be  
inserted in a de-  
claration with an  
&c. as signifi-  
cant of the whole  
sentence.

1. Sid. 187.  
Cro. Car. 347.  
343.

ANOTHER EXCEPTION was, That the demandant does not set forth that he was son and heir of *John*, begotten on the body of *Jane* his wife; for it was a gift in special tail.—But this was over-ruled; for in the writ that is set forth, and in the declaration, after the words "*filio et heredi prædicti*," *JOHANNIS*, came an "&c." which "&c." let the words of the writ into the count; and so it was held good. THE PROTHONOTARY said, That the forms of counts were accordingly. And judgment was given to answer over, *nisi causa*, &c.

(a) See *Buckmere's Case*, 8. Co. 88.  
Brownl. 274.

(b) Co. Ent. 254. b. Raft. Ent. 36.  
(c) Year-Book 9. Edw. 4. p. 36.

MICHAELMAS

# MICHAELMAS TERM,

The Twenty-Eighth of Charles the Second,

I N

The Common Pleas.

*Monday, October 23, 1676.*

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

*Sir Hugh Wyndham, Knt. } Justices.*

*Sir William Scroggs, Knt. }*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

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\* Memorandum.

**M**R. JUSTICE ELLIS being removed from his office Freem. 212. during the Trinity vacation, SIR WILLIAM SCROGGS, one of the king's serjeants, was sworn in his place on the first day of this Term, and took his seat on the bench the *Wednesday* following.

*Blythe against Hill.*

\* [ 221 ]

Case 9.

**D**EBT upon an obligation for the payment of money at a day certain. The defendant pleaded, That the plaintiff, being desirous to have the money paid before the day, took another bond for the same sum payable sooner, and that this was in full satisfaction of the former bond: upon this plea the plaintiff took issue, and it was found against him.

To debt on bond the defendant cannot plead another bond given in satisfaction; but if the plaintiff take issue, and it is

found against him, the defendant shall have judgment.—S. C. post. 225. S. C. 2. Mod. 136. S. C. 2. Danv. 115. 6. Co. 44. Cro. Eliz. 716. Cro. Car. 85. Cro. Jac. 579. 100. Hob. 86. 2. Keb. 304. 3. Lev. 55. Litt. Rep. 53. 1. Brownl. 47. 71. Cowp. 128.

Q 2

SERJEANT

BY THE  
against  
HILL.

MAYNARD, *Serjeant*, moved, That notwithstanding this verdict, judgment ought to be given for the plaintiff, for that the defendant by his plea has confessed the action: and to say, that another bond was given in satisfaction, is nothing to the purpose: *Hob.* 68.: so that upon the whole it appears, that the plaintiff has the right, and he ought to have judgment: *Cro. Jac.* 139. 8. *Co.* 93. a.

See S. C. 2.  
Mod. 137.

THE COURT gave a rule to shew cause why the plaintiff should not have judgment.

Cafe 10.

Savill against the Hundred of ———.

A declaration upon the statute of HUE AND CRY is good after verdict, although it does not state that the robbery was in the highway.

THE plaintiff in an action upon the statute of *Winton* had a verdict; and it was moved in arrest of judgment, That the felonious taking is not said to be in the high-way: *Cro. Jac.* 469. 675.

NORTH, *Chief Justice*. An action lies upon the statute of *Winton*, though the robbery be not committed in the highway:—to which THE COURT agreed:—and THE PROTHONOTARIES said, that the entries were frequently so. *Per quod*, &c.

*Cro. Car.* 167.

3. *Mod.* 258. 8. *Mod.* 8, 9. 11. *Mod.* 8. 12. *Mod.* 54. *Show.* 60. *Cart.* 71. *Comyns*, 345. 829. 1. *Peer. Wms.* 412. 437. *Salk.* 614. 2. *Ld. Ray.* 826. 2. *Str.* 406.

\* [ 222 ]

Cafe 11.

\* *Calthrop against Philips*.

An action lies against a sheriff, though out of office, for not delivering a writ of *superfedeas* to his successor, by reason of which the plaintiff's goods are taken in execution.

ONE J. S. had recovered a debt against *Calthrop*, and procured a writ of execution to *Philips*, the then sheriff of D.; but before that writ was executed, *Calthrop* procured a *superfedeas* to the same *Philips*, who, when his year was out, delivered over all the writs to the new sheriff, save this *superfedeas*; which not being delivered, J. S. procures a new writ of execution to the new sheriff: upon which the goods of *Calthrop* being taken, he brings his action against *Philips* for not delivering over the *superfedeas*.

S. C. 2. *Mod.* 217.

*Moor*, 688.

2. *Leon.* 54.

8. *Mod.* 193.

247. 304.

*Cowp.* 423.

*Dougl.* 465.

2. *Term Rep.* 1.

After a verdict for the plaintiff, it was moved in arrest of judgment, That the action would not lie, for that the sheriff is not bound to deliver over a *superfedeas*. FIRST, Because it is not a writ that has a return. SECONDLY, Because it is only the sheriff's warrant for not obeying the writ of execution.—The prothonotaries said, that the course was to take out a new writ to the new sheriff.

STRODE, *Serjeant*, argued, That the *superfedeas* ought to be delivered over; because the king's writ to the old sheriff is, "quod com. prædict. cum pertinentiis, una cum rotulis, brevibus, memorandis et omnibus officium illud tangentibus, quæ in custodia sua existunt, liberet," &c. and he cited *Reg.* 295. and 3. *Ca.* 72. *Westby's Cafe*. Besides, the *superfedeas* is for the defendant's benefit; and there is no reason why the *capias* should be delivered over, which is for the plaintiff's benefit, and not the *superfedeas*, which

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which is for the defendant's : and he said an action will lie for not delivering over some writs to the new sheriff, though those writs are not returnable, as a writ of estrepement.

CALTHROP  
against  
PHILIPS.

THE COURT inclined to his opinion ; but it was adjourned to a further day ; on which day it was moved again, and the judgment was affirmed (a).

(a) By 20. Geo. 2. c. 37. " For the  
" ease of sheriffs with regard to the return  
" of process, it is enacted, that all sheriffs  
" shall, at the expiration of their office,  
" turn over to the succeeding sheriff,  
" by indenture and schedule, all such  
" writs and process as shall remain in  
" their hands unexecuted, who shall  
" duly execute and return the same :  
" and in case any sheriff shall refuse or  
" neglect to turn over such process in  
" manner aforesaid, every sheriff so  
" neglecting or refusing shall be liable  
" to make satisfaction by damages and  
" costs to the party aggrieved as he, she,  
" or they, shall sustain by such neglect  
" or refusal. But no sheriff shall be  
" liable to be called upon to make a  
" return of any writ or process, unless  
" he be required so to do within six  
" months after the expiration of his  
" office."

\*[ 223 ]

\* Bascawin and Herle against Cook.

Cafe 12.

THOMAS COOK granted a rent-charge of two hundred pounds a-year to Bascawin and Herle for the life of Mary Cook, HABENDUM to them their heirs and assigns, ad opus et usum of Mary; and in the indenture covenanted to pay the rent ad opus et usum of Mary.

A. grants a rent-charge to B. for the life of C. habendum to B. his heirs and assigns, to the use of C. with a covenant in the indenture to pay it to the use of C. If the rent be not paid to B. to the use of C. B. may maintain covenant against A. ; for though the rent-charge is executed in C. by the 27. Hen. 8. c. 10. yet the covenant being collateral remains undischarged with

Bascawin and Herle upon this bring an action of covenant, and assign the breach in not paying the rent to themselves, ad opus et usum of Mary. The defendant demurs :

FIRST, Because the words in which the breach is assigned, contain a negative pregnant.—BALDWIN, for the plaintiff. We assign the breach in the words of the covenant.—CURIA accord.

SECONDLY, Because the plaintiff does not say that the money was not paid to Mary ; for if it were so, it would satisfy the covenant.

THIRDLY, This rent-charge is executed to Mary by the statute 27. Hen. 8. c. 10. of Uses, and she ought to have distrained for it : for she having a remedy, the plaintiffs, out of whom the rent is transferred by the statute, cannot bring this action.

Hereupon two questions were made : FIRST, Whether this remedy by action of covenant be transferred to Mary by the statute 27. Hen. 8. c. 10. of Uses or not ?—and, SECONDLY, If not, whether the covenant were discharged, or not ?

NORTH, Chief Justice, and WYNDHAM. When the statute transfers an estate, it transfers together with it such remedies only, as by law are incident to that estate, and not collateral ones.

ATKINS accordant.—There is a clause in the statute of 27. Hen. 8. c. 10. which gives the cestui que use of a rent all such remedies as he would have had, if the rent had been actually and really granted to him : but that has place only where one is seised of

S. C. 2. Mod. 138.  
9. Co. 61.  
2. Lev. 26.  
1. Vent. 175.  
12. Mod. 45.  
166. 171. 371.  
384. 400.  
3. Term Rep. 393.

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BALDWIN  
AND HERLE  
against  
COOKS.

of lands in trust that another shall have a rent out of them; not where a rent is granted to one to the use of another. They agreed also that the covenant was not discharged; and gave judgment for the plaintiff, *nisi*, &c.

\* [ 224 ]

Case 13. \* Higden *against* Whitechurch, Executor of Dethicke.

If one of two obligors be sued to outlawry, and afterwards judgment and execution is had on the same bond against the other obligor, the outlaw cannot be relieved by *audita querela*, but must sue out his pardon; for the outlawry may be pleaded in disability.

**AUDITA QUERELA.** The plaintiff declares, That he and one *Prettyman* became bound to the testator *Dethicke* for the payment of a certain sum: that in an action brought against him he was outlawed: that *Dethicke* afterward brought another action upon the same bond against *Prettyman*, and had judgment: that *Prettyman* was taken by a *capias ad satisfaciendum*, and imprisoned, and paid the debt, and was released by *Dethicke's* consent. Upon this matter the plaintiff here prays to be relieved against this judgment and outlawry. The defendant, *protestando* that the debt was not satisfied, pleads the outlawry in disability. The plaintiff demurs.

**BALDWIN, for the plaintiff.** *Non datur exceptio ejus rei, cujus petitur dissolutio.* He resembled this to the cases of bringing a writ of error or attain, in neither of which outlawry is pleadable.

Ante, 111. 170.  
6 Idw. 4. pl. 6.  
7. Hen. 4. pl. 39.  
7. Hen. 6. pl. 44.  
Jenk. 37.  
2. Mod. 49.  
8. Co. 141.  
Hob. 2.  
1. Sid. 43.  
Co. Lit. 128.  
584.  
2. Co. 86.  
Cro. Eliz. 225.  
Cro. Jac. 425.  
2. Bulst. 97.

**SEYSE, contra.** Outlawry is a good plea in *audita querela*. This case is not within the maxim that has been cited: a writ of error and attain is within it; for in both them the judgment itself is to be reversed. But in an *audita querela* you admit the judgment to be good, only upon some equitable matter arising since, you pray that no execution may be upon it.

**THE COURT.** If the judgment had been erroneous, and a writ of error had been brought, the outlawry, which was but a superstructure, would fall by consequence; but an *audita querela* meddles not with the judgment: the plaintiff here has no remedy but to sue out his charter of pardon.

12. Mod. 400.

\* [ 225 ]

Case 14.

\* Blythe *against* Hill.

To debt on bond against the heir of the obligor, the defendant may plead another bond given in satisfaction by the administrator of the obligor.

**THE** case being moved again, appeared to be thus: The plaintiff brought an action of debt upon a bond against the defendant as heir to the obligor. The defendant pleaded, that the obligor, his ancestor, died intestate, and that one *J. S.* had taken out letters of administration, and had given the plaintiff another bond in full satisfaction of the former. Upon this, issue being joined, it was found for the defendant.

It was said for him, that one bond might be taken in satisfaction of another; and *Co. Lit.* 212. b. 30. *Edw.* 1. 23. *Dyer* 29. S. C. 2. Mod. were cited.

256.  
Hob. 68. 1. Brownl. 74. Cro. Eliz. 697. Co. Lit. 232. 2. Vern. 62. 10. Mod. 224. 306. 12. Mod. 86. 248. 537. 1. Ld. Ray. 60. 122. 566. 1. Stra. 426. 573. 615. 2. Peer. Wms. 344. 2. Peer. Wms. 343. 553. (614). (616). 3. Peer. Wms. 225. 245.

NORTH,

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**NORTH, Chief Justice.** If the second bond had been given by the obligor himself, it would not have discharged the former: but here, being given by the administrator, so that the plaintiff's security is bettered, and the administrator chargeable *de bonis propriis*, I conceive it may be a sufficient discharge of the first bond.

**BLUTH**  
*against*  
**HILL**

WYNDHAM, *Justice*. I am of the same opinion; for otherwise the administrator and heir might both be charged.

SCROGGS accord.

ATKINS, *Justice*. There are many authorities in the point ; and all directly, that one bond cannot be given in satisfaction of another ; as in *Manhood v. Cluck (a)*, *Norwood v. Gripe (b)*, and many others (c) : yet I hold that judgment ought to be given for the defendant ; for though it be an impertinent issue, yet being found for him, he ought by the statute of 32. Hen. 8. c. 30. to have judgment ; but if no issue at all had been joined, it would have been otherwise (d). SERJEANT MAYNARD cites the Year Book of 9. Hen. 6. but that case was before the statute : so I ground my judgment upon that point.

NORTH, *Chief Justice*. I took it, that *unapt* issues are aided by the statute, but not *immaterial issues*; and so said SCROGGS,

**THE COURT** gave judgment for the defendant, *nisi*, &c.

(π) Cro. Eliz. 716.

452. 6. Co. 44. 1. Burr. q. Cowp.

(b) Cro. Eliz. 727.

47.

(c) Hob. 69. 2. Bac. Abr. 24. (d) See *Pigot v. Pigot*, Cro. Jac. 44.

(d) See *Pigot v. Pigot*, Cro. Jac. 44.

\* Southcot *against* Stowell.

• [ 226 ]

### Cafe 15.

*Hilary Term, 25. & 26. Car. 2. Roll 1303.*

**C**OVENANT FOR NON-PAYMENT OF MONEY. The case was thus, viz. *Thomas Southcot* had issue two sons, *Sir Poppham* and *William*; and in consideration of the marriage of his son *Sir Poppham*, covenanted to stand seised to the use of *Sir Poppham*, and the heirs males of his body; and for default of such issue, to the use of the heirs males of his own body, the remainder to his own right heirs. *Sir Poppham* dies, leaving issue *Edward* his son, and four daughters: then *Thomas* the father died; and then *Edward* died without issue.

The question was, Whether *Sir Popham's* daughters or *William* had the better title?

Two points were made: FIRST, Whether the limitation of the remainder to the heirs males of the body of the covenantor, were good in its creation, or not?

dies without issue. The estate vests in *E.* as a purchaser; and after his death his uncle *D.* takes it by *discent*, as heir male of the body of *A.*—*S. C.* post. 137. *S. C.* Freeman, 216. *S. C.* 2. Mod. 207. *S. C.* 3. Keb. 704. *S. C.* 2. Danv. 556. Ante, 159. 175. Dyer, 156. Cro. Eliz. 109. Co. Lit. 26. b. 220. a. 2. Leon. 25. Cro. Car. 24. *See vide* the case of Wills v. Palmer, 5 Burr. 2615. 2. Black. Rep. 687. Fearn. C. R. 54. to 62.; and Mr. Hargrave's note (3), Co. Lit. 24. b. Prec. in Ch. 54. Doug. 501. 1. Peer. Wms. 62a.

Q4

SECONDLY,

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SOUTHCOT  
again?  
SOUTHWELL.

SECONDLY, Admitting it to be good originally, Whether it could take effect after the death of *Edward*; he leaving sisters, which are general heirs to the covenantor?

NORTH, *Chief Justice*, WYNDHAM and ATKINS, *Justices*, upon admission of the first point, were of opinion for *William*; and that he should have an estate, not by *purchase*, but by *descent* from *Edward*: for after the death of the father, both the estates in tail were vested in him; and he was capable of the remainder by purchase; and being once well vested in a purchaser, the estate shall afterwards run in course of descent. SCROGGS, *Justice*, doubted.

But they all doubted of the first point, and would advise (a).

(a) Vide post. 237, 238.

Case 15\*.

The Countess of Northumberland's Case.

In what case a  
serjeant at law  
may be returned  
as a juror.

S. C. 2. Mod. 182.  
6. Co. 53.  
Co. Lit. 156.  
2. Stra. 1023.

IT was said by the Justices in this case, That if a knight be but returned on a jury, when a nobleman is concerned, it is not material whether he appear and give his verdict, or no.—ALSO, That if there be no other knights in the county, a serjeant at law that is a knight may be returned, and his privilege shall not excuse him (a).

(a) But now by 24. Geo. 2. c. 18. s. 4. on account of the great delay which frequently happened in trials where a peer or lord of parliament was party, by reason of challenges to the arrays of jurors, for want of a knight

being returned on such panels, IT IS ENACTED, "that no challenge shall be taken to any panel of jurors for want of a knight's being returned in such panel, nor any array quashed by reason of any such challenge."

\* [ 227 ]

Case 16.

\* Gayle against Betts.

In debt on bond to pay so long as he continued in office, if the defendant plead, that it was granted for the life of A. and paid during the life of A. the plaintiff may reply, that he did not enjoy it for, and pay during the life of A. &c. but he must assign a breach that he did not pay.

S. C. 3. Keb.

813. S. C. 3. Salk. 142. Post. 289. Hob. 14. 198. 233. 1. Saund. 103. Comyns, 115. 10. Mod. 251. 257. 349. 280. 326. 335. 12. Mod. 54. 92. 1. Ld. Ray. 30. 76. 234. 693. 2. Ld. Ray. 1449. Stra. 227. 2. Will. 11. 267. 1. Burr. 574. 2. Burr. 772. Cowp. 578.

DEBT UPON A BOND. The defendant demands *oyer* of the bond and condition; which was to pay forty pounds *per annum* quarterly, so long as the defendant should continue Register to the Archdeacon of *Salchester*; and pleads, That the office was granted to A. B. and C. for their lives; and that he enjoyed the office so long as they lived, and no longer; and that so long he paid the said forty pounds quarterly. The plaintiff replies, That the defendant did enjoy the office longer, and had not paid the money. The defendant demurs, supposing the replication was double.

PER CURIAM. The replication is not double; for the defendant cannot take issue upon the non-payment of the money; that would be a departure from his plea in bar: so if upon a plea of "nullum fecit arbitrium," the plaintiff in his replication set forth an award and a breach, the defendant cannot take issue upon the breach, for that would be an implicit confession of what he had denied before.

NORTH,

Michaelmas Term, 28. Car. 2. In C. B.

**NORTH, Chief Justice.** If the defendant plead, that he did not exercise the office beyond such a time, till which time he paid the money, the plaintiff may take issue, either upon the payment till that time, or rely upon the continuance: but if he do the latter, he must shew a breach; for the continuance is in itself no breach.

GAYLE  
against  
BETTS.

Ellis *against* Yarborough, Sheriff of Yorkshire. Case 17.

**ACTION UPON THE CASE** against a sheriff for an escape. The plaintiff declares, That one G. was indebted to him in two hundred pounds; and that the defendant took him upon a *latitat* at the plaintiff's suit, and afterward suffered him to escape. The defendant pleads the statute of 23. Hen. 6. c. 10. and that he let G. out upon bail, according to the said statute; and that he had taken reasonable sureties, A. and B. persons having sufficient within the county. The plaintiff replies, and traverses, *absque hoc* that the defendant took bail of persons having sufficient within the county. The defendant demurs.

The clause of the statute 23. Hen. 6. c. 10. which authorises sheriffs to discharge prisoners, "upon reasonable sureties of sufficient persons having suffi-

**SKIPWITH.** The sheriff is compellable to take bail. \* If he take insufficient bail, the course is for the Court to amerce the sheriff, and not for the party to have an action upon the case (a). If the sheriff take no bail, an action lies against him; and all actions brought upon this statute are founded upon this suggestion (b). But if he take insufficient bail, it is at his own peril, and no action lies: the sheriff is judge of the bail, and the sum is at his discretion (c): and so are the number of the persons; he may take one, two, or three, as he pleaseth (d). Besides, the traverse is pregnant; for it implies, that the persons have sufficient out of the county; and the sheriff is not bound to take bail only of persons having sufficient within the county.

\* [ 228 ]  
"cient within the county," is to be construed for the benefit of sheriffs; and therefore no action lies for taking sureties that are insufficient, or do not inhabit within the county: but if he do not bring in the body at the return of the writ, or suffer him to go at large without authority, he is liable to an action.

**SERJEANT BARRELL, contra.**—But THE COURT not agreeing in their opinions upon the matter of law, it was put off to the next Term to be argued.

**BALDWIN, for the defendant.** The sheriff is compellable to let him to bail, and is judge of the sufficiency of the sureties. The statute was made for the prisoner's benefit; for the mischief before was, that the sheriff not being compellable to bail him, would extort money from him to be bailed: and the word "sufficient" is added in favour of the sheriff; and so are the words "within the county." The sheriff is not compellable to assign

S. C. Freeman. 219. S. C. 2. Mod. 177.

Ante, 57. Post, 239. 244. Cro. Eliz. 808. 852. 862. Noy, 39. 1. Sid. 96. 2. Saund. 59. 2. Mod. 83. 10. Mod. 288. 12. Mod. 385. Comyns, 422. 554. 1. Ld. Ray. 722. 1. Peer. Wms. 687. held, that an action lies against the sheriff for taking insufficient pledges in replevin, Hilary Term, 13. Geo. 2. B. R. Sir William Rouse v. Paterfon, 16. Viners Abr. 399. c. 4. See also Cro. Eliz. 624. Cro. Jac. 286. 1. Roll. Abr. 807. Moor, 428. 1. Ld. Ray. 425. 1. Salk. 99. 6. Mod. 127. 1. Term Rep. 418. 2. Term Rep. 172.

- (a) Cro. Eliz. 852. Noy, 39. (d) Cro. Eliz. 808. 1. Sid. 96.  
(b) Cro. Eliz. 460\*. Moor, 428. 10. Co. 101. Salk. 97. Impey's Sheriff, 124.  
(c) Cro. Jac. 286.

the

Michaelmas Term, 28. Car. 2. In C. B.

**ETLES**  
**against**  
**YARBOROUGH.**

1. Sid. 23.  
2. Mod. 84.  
1. Salk. 99.

the bail-bond (a) ; and then, if the plaintiff cannot have the security given by the defendant for his appearance, it is all one to him, whether it be good or no.

**STRODE, contra.** Why must the sheriff always aver that he has taken sufficient sureties, if their sufficiency be not material? Why is an action allowed to lie, if the sheriff take no sureties at all, since, according to my brother's opinion, the party has no interest in them? If the law be as they argue, the statute has left the plaintiff in a worse condition than he was at the common-law; for it has deprived him of the remedy he had before; and the amercements belong not to him, but to the king.

2. Savad. 60.  
2. Term. Rep.  
174.

**ATKYNs, Justice.** The sufficiency of the bail is not material; it is only for the sheriff's own security. If he take no bail at all, an action lies against him, for then he does not act by colour of this law. The statute is not advantageous to \* the plaintiff at all, unless the sheriff let go the prisoner without taking bail; and then he must render treble damages.

\* [ 229 ]

And, by the opinion of **THE WHOLE COURT**, judgment was given for the defendant.

(a) But now by 4. & 5. Ann. c. 16. §. 20. "The sheriff, at the request and costs of the plaintiff, shall assign the bail-bond to the plaintiff, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action be brought thereupon: and if the bail-bond be forfeited, the plaintiff, after such assignment, may bring an action thereupon in his own name, and the Court give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond, as is agreeable to justice, &c."

**Case 18.**

**Moor against Field.**

**A** modus to pay full tithes for all sheep on the ground on a particular day, in lieu of tithes for the rest of the year, is bad. Ante, 216.

**A** CUSTOM was alledged, That all persons, in a parish, that had sheep upon the ground on *Candlemas-day*, should be discharged of tithes of all sheep that should be upon the ground after in that year, upon payment of full tithes for all the sheep that were there upon that day:—and this was adjudged an unreasonable custom. **SERJEANT TURNER** argued for it, and cited 2. Roll. Abr. 647, 648.

1. Roll. Abr. 648. Cro. Eliz. 446. Carthew, 461. Fitzg. 55. 12. Mod. 497. 1. Ld. Ray. 359. 677. 2. Ld. Ray. 1558. 2. Strange, 1224. Bunb. 307. 3. Com. Dig. "Dismes" (E 15). Dougl. 204. 2. Brown's Cases in Chan. 161.

# HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles  
the Second,

I N

The Common Pleas.

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkyns, Knt.*

*Sir Hugh Wyndham, Knt.*

*Sir William Scroggs, Knt.*

} *Justices.*

*Sir William Jones, Knt. Attorney General.*

*Sir Francis Winnington, Knt. Solicitor General.*

\* [ 230 ]

\* Strobe *against* the Bishop of Bath and Wells, and Sir George Horner and Masters. Case 19.

**Q**UARE IMPEDIT. The plaintiff entitles himself by virtue of a grant of the next avoidance made by *Sir George Horner*; and counts, that *Sir George* was seised in fee of the manor of *Dowling*, to which the advowson was appendant, and presented one *Harding*, who was admitted, instituted, &c. and that then he granted the next avoidance to the plaintiff; and that *Harding* died, and it belongs to him to present.

*In quare impedit*, if the plaintiff alleges that *A.* was seised in fee of such a manor, to which the advowson was appendant, he need not, in stating the presentation, allege, that it was *tempore pacis*.

**SERJEANT BARTON.** The plaintiff has failed in his count. He says, that *Sir George* was seised and presented; but he does not say, that he presented *tempore pacis*.

**STRODE.** When the plaintiff makes his title by a presentation he ought to say, that it was *tempore pacis*; but *Sir George's* title is by reason of his being seised of the manor of *Dowling*, to which the advowson is appendant: so that the difference as to that, will be betwixt an advowson *in gross* and an advowson *appendant*.

S. C. 2. Mod. 183. Post. 253. Fitz. N. B. 31. 33. Co. Lit. 249.

5. Co. 72. 6. Co. 30. Hob. 102. Vaugh. 53. 10. Mod. 310. 1. Ld. Ray. 200. 2. Str. 1006. 1011.

THE

Hilary Term, 28. & 29. Car. 2. In C. B.

STRODE  
against  
THE BISHOP  
OF BATH AND  
WELLS, AND  
OTHERS.

Strange, 1006.

• [ 231 ] -

Cafe 20.

\* Davies against Cutts.

To an action by the administrator of a *feme covert*, a plea that administration ought to have been to her husband is bad.

THE COURT. When a man shews a precedent right, and then alleges a presentation in pursuance of that right, as in this case the plaintiff does in *Sir George Horner*, there it needs not be alleged to have been *tempore pacis*; but where no title is alleged, so that the presentation only makes the title, there it must be pleaded *tempore pacis*.

DAVIES, as administrator to *Elizabeth B. a feme covert*, brings an action of debt upon a bond against *Cutts*. The defendant pleads, that administration of the wife's goods ought *de jure* to be committed to the husband, who was then alive. Upon this there was a demurrer:—and IT WAS RESOLVED for the plaintiff; for he is rightful administrator till his letters of administration are repealed.

4. Co. 51. 12. Mod. 306. 618. Fitzg. 205. 303. 1. Vern. 88. 170. 2. Vern. 319. 3. Stra. 891. 1111. 1118. 1. Peer. Wms. 378. Salk. 36. 38.

See the statute 21. Hen. 8. c. 5. f. 7. By 29. Car. 2. c. 3. f. 25. it is enacted, "that neither the statute of *distributions*, "of 22. & 23. Car. 2. c. 10. nor any "thing therein contained, shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that "their *husbands* may demand and have "administration of their rights, credits, "and other personal estates, and receive "and enjoy the same, as they might have "done before the making of the said "act."

Cafe 21.

James against Johnson.

A toll traverse may be claimed as appurtenant to a manor by a *que estate* in the manor. The appurtenancy is not destroyed by the manor coming into the hands of the crown.

TRESPASS for taking and driving away some beasts of the plaintiff. The defendant justifies, For that he and all they whose estate he has in such a manor (the manor of *Blythe*) have had a toll for all beasts driven over the said manor, viz. a half-penny a-beast if under twenty; and if above, then fourpence a-score.

S. C. 2. Mod. 143. S. C. cited 3. Lev. 425. 1. Vent. 139. 10. Co. 59. Bunb. 68.

Issue being joined upon this *justification*, a special verdict was found, viz. That the manor aforesaid was parcel of the possessions of the priory of *Blythe*: that the prior had by prescription such a toll as appurtenant to the said manor: that by the Dissolution it came to the crown, and so to *Sir Gervase Clifton*, and at last to one *Bingley*, in whose right, as servant to him, the defendant justifies: but then they conclude, that if the defendant may entitle himself to it by a *que estate*, they find for the defendant; if not, then for the plaintiff.

Co. Lit. 121. Com. Dig. title, "Pleader," E. 24.

SERJEANT BALDWIN, for the plaintiff. It does not appear, whether the toll which the defendant claims, be a *toll-thorough*, or a *toll-traverse*, or what sort of toll it is. A *toll-thorough* is

Fort. 339. Ante, 48. 105. 1. Lev. 190. 2. Lev. 19. Ray. 52. 389. Keilw. 148. 151. Statham, 2. pl. 236. Moor, 574. Cro. Eliz. 710. 3. Lev. 424. Comyns, 44. 1. Ld. Ray. 368. 2. Ld. Ray. 1400. 2. Wils. 296. 3. Burr. 1402. Cowp. 47. 1. Term Rep. 660.

against

Hilary Term, 28. & 29. Car. 2. In C. B.

against common right, because it is to be taken in the king's highway: and no prescription can be for it, unless he that claims it, shew that the subject has some advantage by it: and when a man claims a *toll-traverse*, he must lay it to be for a way over his own freehold. A toll supposeth a grant from the \* crown; and therefore when the manor of *Blythe* came to the crown, the toll was disjoined from the manor, and became *in gross*: nor can a toll be appendant to a manor, nor claimed by a *que estate*.

JAMES  
against  
JOHNSON.

\* [ 232 ]

SERJEANT MAYNARD. The jury have found exactly whatever the defendant has disclosed in his plea, and have made a special conclusion upon a point of pleading. Toll may be appurtenant to a manor, as well as any other *profit à prendre*; nor does it become *in gross* by the manor coming to THE CROWN. The difference is as to that, betwixt things that had a being in the crown before they were granted out to subjects, and things which had not (*a*). There is no such legal difference between a *toll-thorough* and a *toll-traverse* as has been offered; the words are used promiscuously in our books. A *toll-thorough* may be by prescription, without any reasonable cause alledged of its commencement: for having been paid time out of mind, the true cause of its beginning, in the intendment of the law, cannot be known. And for the *que estate*, indeed a thing that lies in grant cannot be claimed by a *que estate* directly by itself, but it may be claimed as appurtenant to a manor, by a *que estate* in the manor, &c.

CUR. accord. (*b*), and gave judgment for the defendant.

ATKYNs, *Justice*. When toll is claimed generally, it shall be intended *toll-thorough*; and so is the case in *Cro. Eliz.* 710. *Smith v. Shepherd*.

(*a*) See the case of the Abbot of Strada Marcella, 9. Co. 24.

(*b*) See 1. Term Rep. 666.

Lord Townsend against Dr. Hughes.

Case 22.

AN ACTION UPON THE STATUTE *de scandalis magnatum*, for these words: " My Lord Townsend is an unworthy person, and does things against law and reason." Upon issue " not guilty," there was a verdict for the plaintiff, and four thousand pounds damages given. The defendant moved for a new trial, Because of the excessiveness of the damages; and a precedent was cited of a new trial granted upon that ground and no other.—ATKYNs, *Justice*, was for granting a new trial.—NORTH, *Chief Justice*, WYNDHAM and SCROGGS *contra*, for that the jury are the sole judges of the damages.

The Court will not grant a new trial in an action of *scan. mag.* on the ground of *excessive damages*.  
S. C. 1. Freem. 217. 220. 222.  
S. C. 2. Mod. 150.  
Ante, 2.  
1. Lev. 277.  
Cowp. 230.

1. Vent. 59. 1. Sid. 434. Comyns, 439. 1. Str. 422. 2. Ld. Ray. 954.

MAYNARD,

An action will lie on the statute of *scandalis magistram* for saying of a peer of the realm, that "he is an unworthy person, and does things against law and reason."

S. C. 1. Mod. 233.  
4. Co. 13.  
1. Roll. Rep. 78.  
Vid. Ent. 72.  
Cro. Car. 136.  
1cy. 82.  
Palm. 562.  
12. Co. 134.  
1. Lev. 148.  
277.  
1. Sid. 434.  
1. Vent. 60.  
3. Bullt. 226.  
Cro. Eliz. 68.  
1. Leon. 336.  
1. And. 121.  
Cro. Jac. 196.  
2. Inst. 228.  
Dyer 285.  
Foph. 67.

\* MAYNARD, *Serjeant*, at another day moved in arrest of judgment (a), That the words are not actionable.—And of that opinion was ATKYNS, *Justice*; but NORTH, *Chief Justice*, WYNDHAM, and SCROGGS, *Justices*, *contra*: and so the plaintiff had judgment.

ATKYNS, *Justice*. The occasion of the making of the statute of 2. Rich. 2. ft. 1. c. 5. appears in *Sir Robert Cotton's* Abridgement of the Records of the Tower, fol. 173. num. 9, 10. where he says, That, upon the opening of that parliament, the *Bishop of St. David's*, in a speech to both Houses, declared the causes of its being summoned; and that amongst the rest, one of them was to have some restraint laid upon the slanderers and sowers of discord; which sort of men were then taken notice of to be very frequent. *Ex malis moribus bonæ leges*. The preamble of the act mentions, "Of devisers of false news, and of horrible and false lies of prelates, dukes, earls, barons, and other nobles and great men of the realm, &c. which by the said prelates, lords, nobles, and officers aforesaid, were never spoken, done, nor thought, in slander of the said prelates, lords, nobles, and officers, whereby debates and discord might arise betwixt the said lords, or betwixt the lords and the commons; and whereof great peril and mischief might come to all the realm, &c. if due remedy be not provided; and therefore it is strongly defended upon grievous pain, for to eschew the said damages and perils, that from henceforth none be so hardy to devise speak or tell any false news, lies, or other such false things of prelates, lords, and of others aforesaid, whereby of discord or any slander might rise within the same realm; and he that doth the same, shall incur and have the pain another time ordained thereof by the statute of *Westminster* the first (b), which wills, that he be taken and imprisoned till he have found him of whom the word was moved."—So that it seems designed against telling stories by way of news concerning them. The statute does not make or declare any new offence; nor does it inflict any new punishment. All that seems to be new is this: FIRST, The offence receives an aggravation, because it is now an offence against a positive law, and consequently deserves a greater punishment; as it is held in our Books, that if the king prohibit by his proclamation a thing prohibited by law, that the offence receives an aggravation by being against the king's proclamation. SECONDLY, Though there be no express action given to the party grieved, yet by operation of law the action accrues. For whenever a statute prohibits any thing, he that finds himself grieved, may have an action upon the statute. 10. Co. 75. 12. Co. 100.

(a) See his argument, S. C. 2. Mod. 252. S. C. Freem. 220. pl. 227. 1. Sid. 233. 434. 1. Keb. 813. 1. Lev. 148. 277. 2. Keb. 537. Freem. 49. Vent. 60. 2. Sid. 21. 12. Co. 4. Co. 16. 2. Show. 505. Moor, 142. Cro. Eliz. 1. 67. Cro. Jac. 196. 3. Leon. 376. Hetley, 55. 3. Bullt. 226. 1. Leon. 336.

(b) By 3. Edw. 1. c. 34. which ordains, that the offender shall be taken and kept in prison until he hath brought him into court who was the first author of the tale. And by 12. Rich. 2. c. 1. if he cannot find the author, he shall be punished by advice of the council.

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There this very case upon this statute was agreed on by the Judges. So that that is the second new thing, viz. a further remedy, an action upon the statute. THIRDLY, Since the statute, the party may have an action in the *tam quam*, which he could not have before. Now every *lie* or *falsety* is not within the statute; it must be *horrible* as well as *false*. We find upon another occasion such a like distinction. It was held in *Sir William Chancey's Case* (a), That the high-commiſſion court could not puniſh *adultery*; be-  
 cause they had jurisdiction to puniſh enormous offenders only. So that "*great* and *horrible*" are words of distinction.—AGAIN, it extends not to ſmall matters, becauſe of the ill conſequences men-  
 tioned; " debates and diſcord betwixt the \*ſaid lords, &c. great \* [ 234 ]  
 " peril to the realm, and quick ſubverſion and deſtruction of the  
 " ſame." Every word imports an aggravation. The ſtatute does  
 not extend to words that do not agree with this deſcription, and  
 that cannot by any reaſonable probability have ſuch dire effects.  
 The caſes upon this ſtatute are but few, and late in reſpect of the  
 antiquity of the act. It was made in the year 1379. For a long  
 time after we hear no tidings of an action grounded upon it; and  
 by reading it one would imagine, that the makers of it never in-  
 tended that any ſhould be. But the action ariſes by operation of  
 law; not from the words of the act, nor their intention that made  
 it. The firſt caſe that we find of an action brought upon it, is in  
 13. Hen. 7. which is one hundred and twenty years after the law  
 was made: ſo that we have no *contemporanea expoſitio*, which we  
 often affect. That caſe in *Keilway* 26. the next in 4. Hen. 8.  
 where the *Duke of Buckingham* recovered forty pounds againſt  
 one *Lucas*, for ſaying that " the duke had no more conſcience  
 " than a 'dog; and ſo he got money, he cared not how he  
 " came by it." He cited other caſes, and ſaid he obſerved, That  
 where the words were general, the Judges did not ordinarily  
 admit them to be actionable: otherwiſe, when they charged a  
 peer with any particular miſcarriage. MAYNARD, *Serjeant*,  
 obſerved well, that the nobility and great men are equally con-  
 cerned on the defendant's part: for actions upon this ſtatute lie  
 againſt them, as well as againſt the meanest ſubject. Acts of  
 parliament have been tender of racking the king's ſubjects for  
 words; and the ſcripture diſcountenances men's being made  
 tranſgreſſors for a word. I obſerve that there is not one caſe to  
 be met with, in which, upon a motion in arreſt of judgment in  
 ſuch an action as this, the defendant has prevailed. The Court  
 hath ſometimes been divided; the matter compounded; or the  
 action has abated by death, &c. but a poſitive rule that judgment  
 ſhould be arreſted we find not: ſo that it is time to make a pre-  
 cedent, and fix ſome rules according to which men may demean  
 themſelves in converſe with great perſons. *Mifera eſt ſervitus*,  
*ubi juſ eſt vagum*. Since we have obtained no rules from our  
 predeceſſors in actions upon this ſtatute, we had beſt go by the ſame  
 rules that they did in other actions for words. In them, when

LORD  
TOWNSEND  
againſt  
DR. HUGHES

Moor, 244.

(a) 12, Co. 83.

they

they grew frequent, some bounds and limits were set, by which they endeavoured to make these laws certain. The actions now encrease. The \*stream seems to be running that way. I think it is our part to obviate the mischief. So he was of opinion, That \* [ 235 ] the judgment ought to be arrested.

But THE COURT gave judgment for the plaintiff.

Cafe 23.

Jones's Cafe.

The court of common pleas may grant a writ of *habeas corpus*, though in a criminal case.

S. C. 2. Mod. 198.  
Prac. Reg. 282.  
Off. Br. 110.  
112.  
Andrews, 274.  
3. Burr. 144c.  
Tidd's Practice, 170.  
See 3. Bac. Abr. 3. 4. 15.

JONES was committed to *New Prison* by a warrant from a justice of the peace on the statutes of the 16. Car. 2. c. 4. and the 22. Car. 2. c. 1. for refusing to give security for his good behaviour; he having been instrumental in the escape of a preacher of a *conventicle* opened contrary to those statutes.—MAYNARD, Serjeant, moved the Court for a *habeas corpus ad subjiciendum*. But NORTH, Chief Justice, doubted whether the court of common pleas could grant this writ in a criminal case.

There are, he said, three sorts of *habeas corpus* in this court: FIRST, A *habeas corpus ad respondendum*; and that is, when a man hath a cause of suit against one that is in prison, he may bring him up hither by *habeas corpus*, and charge him with a declaration at his own suit.—SECONDLY, There is a *habeas corpus ad faciendum et recipiendum*; and that defendants may have, that are sued in courts below, to remove their causes before us. Both these *habeas corpus* are with relation to the suits properly belonging to the court of common-pleas. So if an inferior court will proceed against the law, in a thing of which we have consuance, and commit a man, we may discharge him upon a *habeas corpus*; this is still with relation to the common-pleas. A third sort of *habeas corpus* is for privileged persons. But a *habeas corpus ad subjiciendum* is not warranted by any precedents that I have seen (a).

(a) The writ was granted, and the prisoner brought into court; but he was remanded, because the Court would not take sureties for his good behaviour: but now by the *habeas corpus* act,

31. Car. 2. c. 2. any of the superior courts in Term time, and any judge of any of those courts in vacation time, may award a *habeas corpus* to any prisoner whatsoever.

# E A S T E R T E R M,

The Twenty-Ninth of Charles the Second,

I N

The Common Pleas.

*Sir Francis North, Knt. Chief Justice.*

*Sir Robert Atkins, Knt.*

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*Sir William Jones, Knt. Attorney General:*

*Sir Francis Winnington, Knt. Solicitor General.*

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\* Hall *against* Booth.

Case 1.

**N**ORTH, *Chief Justice.* In actions of debt, &c. the first process is a *summons*: if the defendant appear not upon that, a *capias* goes; and then we hold him to bail. The reason of bail is upon a supposition of law, that the defendant flies the judgment of the law. And this supposition is grounded upon his not appearing at the first. For if he appear upon the *summons*, no bail is required (*a*). And this is the reason why it is held against the law, for any inferior court to issue out a *capias* for the first process: for the liberty of a man is highly valued in the law, and no man ought to be abridged of it without some default in him.

In civil actions the first process is *summons*; and if the defendant appear, *common bail* shall be filed; but if he do not appear, a *capias* issues to hold him to *special bail*.

Yelv. 53. 6. Mod. 63. Dougl. 62. note (31).  
Prac. Reg. 72.

(\*) See Tidd's Practice 28. 121.

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Cafe 2.

Rogers *against* Davenant.

The spiritual court may compel parishioners to make a rate for repairing the nave of the church but not of the chancel; but the rate,

whether for repairing or rebuilding, must be made by the majority of the parishioners assembled by a general public summons from the churchwardens.—S. C. ante, 194. Post. 259. Fitz. N. B. 50. 2. Inst. 487. 5. Co. 67. Poph. 197. 2. Roll. Abr. 291. 311. 1. Roll. Rep. 126. Lutw. 1023. 1. Ld. Ray. 59. 3. Term Rep. 3.

**BY THE COURT.**—FIRST, If a church is in decay, the bishop's court must proceed against the whole parish to have it repaired; for they cannot rate any particular person towards the repair of it. But the churchwardens must summon the parish; and that needs not be from house to house, but a general public summons at the church is sufficient: and the major part of them that appear may bind the parish.

SECONDLY, If the church and chancel be out of repair, the parishioners are only chargeable to be contributory towards the repairs of the *navis ecclesiæ*.

THIRDLY, If a libel be against the parish for not repairing the church, though the word "*ecclesiæ*" may include *the chancel*, yet we will not grant a prohibition.

3. Keb. 829.  
1. Jones, 89.  
2. Mod. 222.  
259.  
2. Lev. 186.  
1. Vent. 367.  
308.  
8. Mod. 338.  
10. Mod. 12.22.

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12. Mod. 83.  
1. Ld. Ray. 89.  
2. Ld. Ray.  
1388. 1390.  
1. Stra. 570.  
2. Stra. 1045.  
1145.  
2. Peer. Wms.  
107. 125.  
Andrews, 69.  
Fort. 346. 199.  
3. Burr. 1689.

FOURTHLY, If a tax be set by the major part of the parish *pro reparatione ecclesiæ*, it is well enough; and afterward any part of the money raised be laid out upon the chancel, the parish ought not to allow it upon the churchwardens accounts. But if a tax be imposed expressly for the repair of the body of the church and of the chancel, we will not suffer them to proceed. Or if a libel be against a parish for not repairing the *navis ecclesiæ* and *the chancel*, we will prohibit \* them.

FIFTHLY, If a church be down, and the parish increased, so that of necessity they must have a larger church, the major part of the parish may raise a tax for the enlarging it as well as the repairing it.

It was insisted on at the bar, That to a tax for the increasing of a church, the consent of every parishioner must be had.—But THE COURT was of another opinion.

See the statute *De Circumspetto Agatis*, 13. Edw. 1. stat. 4. c. 1.

Cafe 3.

Southcote *against* Stowell.

A. having two sons C. and D. covenants to stand seised to

**BALDWIN, for the plaintiff.**—Thomas, the covenantor, may be said to take an estate for life by implication; and then it will be all one as if an express estate for life had been limited to the use of C. and the heirs male of his body; and for default of such issue, to the use of the heirs male of his own body, with remainder to his own right heirs. C. dies, leaving issue a son E. and a daughter: then A. dies: then E. dies without issue. The remainder to the heirs male of A. vested in E. as a *purchase*; and after his death the estate descended to his uncle D. as heir male of the body of A. *per formam doni*.—S. C. ante, 226. S. C. 2. Mod. 207. S. C. Freem. 216. S. C. 3. Keb. 704. S. C. 2. Danv. 556. Ante, 120. 160. Co. Lit. 22. 26. 2. Co. 91. 1. Vent. 381. Dyer, 156. Cro. Eliz. 109. Cro. Car. 24. 2. Leon. 25. Co. Lit. 220. 8. Mod. 23. 9. Mod. 4. 162. 176. 10. Mod. 421. 436. 370. 520. 11. Mod. 119. 12. Mod. 34. Gilb. Eq. Rep. 76. Fitzg. 14. 1. Ld. Ray. 34. 1. Peer. Wms. 59. 229. 622. 2. Peer. Wms. 1. 3. Com. Dig. "Estate" (B 3.). Dougl. 501.

him,

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him, with a remainder to his heirs males, which would be a fee-tail executed in himself; and if so, then *William* has a good title; and he cited *Lord Paget's Case* (a), the *Rector of Chedington's Case* (b), *Fenwyke v. Mittford* (c), *Hodgekinson v. Wood* (d), and *Lane v. Pannell* (e). But if this will not hold, then *William* may take an estate by way of future springing use: for this he quoted the case of *Mills v. Parsons* (f). If neither of these ways will serve, yet the remainder to the heirs males of *Thomas* may vest in *Edward* (for *Sir Popham* died in the covenantor's life-time), and *William* may take by descent, as special heir *per formam doni*, though he be not heir of the body of *Edward*, in whom the remainder first vests.

SOUTHCOTE  
against  
STOWELL.

STROUD, *contra*. The limitation of a remainder in tail to the heirs males of the covenantor, is bad in its original creation; for no man can make himself, or his own heirs, *purchasers*, without departing with the whole fee-simple. But all the cases (g) are of estates passed by conveyance at common-law, and not by way of use. But uses are directed \* by the rules of the common-law, and as to the vesting of them, differ not from estates conveyed in possession: *Chudleigh's Case* (h). No favourable construction ought to be made for uses against a rule of law. The statute of 27. Hen. 8. c. 10. seems intended to extirpate all private uses, and was in restitution of the common law. He cited the *Earl of Bedford's Case* (i), and *Fenwyke v. Mittford* (k). If *Thomas* took any estate by this settlement, he took a fee-simple; for no estate being limited to him, if he took any the law vested it in him. Now the act of law will not settle in him an estate-tail, which is a fettered estate, but a fee simple, if any-thing. And the rather, because the reason of it must be upon a supposition, that the *old use* continues still in him, being never well limited out of him. Then he argued, that admitting the limitation to be good, yet since it vested in *Edward* as a purchaser, it is spent by his dying without issue.

\* [ 238 ]

But NORTH, Chief Justice, WYNDHAM, and ATKINS, *Justices*, were of opinion, That if an estate limited to a man, and the heirs of the body of his father, vest in him, be it either by *descent* or *purchase*, and he die without issue, it shall go to his brother, &c.: so in this case, if the remainder to the heirs males of *Thomas* ever vested in *Edward*, it comes to *William*, as heir male of the body of *Thomas*, and he is a *special heir* to take by descent.

- |   |  |
|---|--|
| (a) 1. And. 265.                          | pl. 32. 1. Hen. 5. pl. 8. 2. Hen. 5.   |
| (b) 1. Co. 154.                           | pl. 4. 1. Bro. Abr. 288. b. pl. 66.    |
| (c) Moor, 284. 1. And. 256.               | 1. Hen. 8. pl. 65. 42. Aff. 2.         |
| Cro. Eliz. 321.                           | Dyer, 69. b. 309. b. Co. Lit. 22.      |
| (d) Cro. Car. 23.                         | 2. Inst. 333. 2. Bro. Abr. 69. pl. 66. |
| (e) 1. Roll. Rep.                         | (b) 1. Co. 138.                        |
| (f) 2. Roll. Abr. 794.                    | (i) 1. Co. 130. Poph. 3. Moor,         |
| (g) 24. Edw. 3. pl. 28. 42. Edw. 3.       | 718.                                   |
| pl. 5. Bro. Abr. 287. pl. 23. 14. Hen. 4. | (k) Co. Lit. 22. b.                    |

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SECONDLY, They agreed, That at the common-law, a man could not make his right heir a purchaser, without parting with the whole fee; but that by way of use he might: *Creswold's Case*, in *Dyer*, is of an estate executed. They agreed the limitation of the remainder, in this case, to be good; and that it vested in *Edward*, as a purchaser.

But see *Wills v. Palmer*, 5. Burr. 2615.  
2. Bl Rep. 687.  
and *Fearne C.R.* 54.

NORTH, *Chief Justice*. It cannot take effect as a springing use; because where the limitation is of a remainder, the law will never construe it so, as to support it any other way. This, he said, he had known resolved in one *Cutler's Case*, in the king's bench.

SCROGGS, *Justice*, agreed to the judgment; but said, he went contrary to the books in so doing, which go upon nice and subtle differences, little less than metaphysical.

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Cafe 3\*.

\* Justice against Whyte.

In debt against A. as executor of B. if he plead that he is administrator, and not executor, he must expressly shew, that B. died intestate, and the time when administration was granted, and

DEBT against the defendant as executor to *John Whyte*. The defendant pleaded, That *John Whyte* did make a will, but made not him executor, and that the said *John* had *bona notabilia* in divers dioceses, and that the Archbishop of *Canterbury* committed administration to the defendant, and concluded in bar; to which there was a demurrer.

SERJEANT TURNER. FIRST, This is a plea in abatement only, and the defendant has concluded in bar: *Cro. Eliz.* 202. *Ipsam v. Hitchcot*.

was granted, and conclude in abatement and not in bar.—Ante, 214. 11. Co. 52.

1. Sid. 359.  
8. Co. 134.  
1. Lev. 235.  
Comyns, 150.  
2. Stra. 1106.  
8. Mod. 244.  
283.  
12. Mod. 100.  
3. Peer. Wms. 349.  
3. Peer. Wms. 370.  
2. Eq. Abr. 78.

SECONDLY, The defendant does not traverse, *absque hoc* that he ever administered as executor: 20. *Hen.* 6. 1. b. per FORTESCUL.

THIRDLY, The defendant does not shew when administration was committed to him; for if it were committed hanging the writ, it will not abate it: 21. *Hen.* 6. pl. 8. 5. *Hen.* 5. pl. 10, 11. *Br. tit. "Executors,"* 7. 4. *Hob.* 49.

FOURTHLY, The defendant does not lay it expressly that *John Whyte* died intestate; but only says, that he made a will, but did not appoint him, the defendant, to be his executor by that will, and that administration was granted to him. Now although the defendant was not made executor by the will, yet he might have been made so by a codicil annexed to the will: 2. *Roll. Rep.* 285.

1. Peer. Wms. 766.

FIFTHLY, He says not in what province the *bona notabilia* were; and perhaps they were in the province of *York*.

THE COURT gave judgment for the plaintiff, *nisi causa*, &c. chiefly for the first and fourth reasons.

**M**IDD. sc. HENRICUS TULSE nuper de Lond. miles, et ROBERTUS JEFFRIES nuper de Lond. miles, nuper vicecom. com. prædict. attachiati fuer. ad respondendum THOMÆ PAGE de placito transgress. super casum, &c. Et unde idem THO. per BALE attornatum suum queritur, quare cum quidem SAM. \* WADHAM, alias WADDAM, Term. Sancti. Trin. ann. regni dom. regis nunc vicefimo sexto, et antea indebitatus fuisset eidem THO. PAGE in 34 libris monete Angliæ, idemque THO. pro obtentione earund. eodem Term. Sancti. Trin. anno vicefimo sexto supradict. debito modo profectus fuisset extra cur. domini regis nunc coram ipso rege (eâdem curiâ apud Westmonast. in prædict. com. Midd. tunc existente) quoddam præceptum ipsius domini regis versus prædict. SAMUELEM vicecom. Midd. direct. per quod eid. tunc vicecomiti præcept. fuit, quòd caperet præfatum SAMUELEM, si, &c. et eum salvo, &c. ita quòd haberet corpus ejus cor. dict. dom. rege apud Westmonast. die Veneris prox. post. tres septimanas Sancti Mich. prox. sequent. ad respondendum eidem THO. de placito transgr. ac etiam billæ ipsius THO. versus prædict. SAM. pro triginta quatuor libris super assumptionem secund. consuetud. cur. dict. dom. regis cor. ipso rege exhibend. et quòd idem vicecomes haberet ibi tunc præceptum illud, &c. Quòd quidem præceptum idem THOMAS postea et ante return. ejusd. scil. quarto die Julii anno vicefimo sexto supradict. apud Westmonast. in com. prædict. præfat. HENRIC. et ROBERTO tunc vicecom. prædict. com. Midd. deliberavit, eâ intentione quòd prædict. SAMUEL. virtute præcepti illius caperetur et arrestaretur, et ad præd. diem return. ejusdem in dict. cur. dict. dom. regis coram ipso rege secundum consuetudinem ejusdem cur. custodia Marischalli Marischalciæ dom. regis cor. ipso rege committeretur, ad intentionem quòd idem THO. versus præfat. SAMUEL. custodia ejusdem Marischalli Marischalciæ sic commissum, et in custod. suâ existent. secund. consuetudinem dict. cur. dict. dom. regis coram ipso rege per bill. ipsius THO. versus præd. SAMUEL. in eâdem cur. exhibend. in placito transgressionis super casum super assumptionem ipsius SAM. pro præd. 34 libris eid. THO. solvend. et pro recuperatione earund. narraret et implacitaret: et quòd præd. SAM. antequam ipse ab hujusmodi custod. prædict. Marischall. Marischalciæ deliberaretur aut ad largum ire dimitteretur, imponeret in eâdem cur. in præd. placito transgressionis super casum sufficientes manucaptos eid. THO. inde responsur. secund. consuetudinem cur. illius; virtute cujus quidem præcepti prædictus HENRICUS et ROBERTUS postea et ante return. ejusdem, scil. 14 die Julii ann. 26 supradict. tunc vicecom. com. præd. ut præfertur, existentes præfat. SAMUEL. apud Westmonaster. prædict. in com. prædict. ceperunt et arrestaverunt, et ipsum SAMUEL. in custodia suâ ex causâ prædict. habuerunt et detinuerunt. Prædicti tamen HENRICUS et ROBERTUS, officii sui vicecom' debitum in verâ et justâ executione præcepti istius, iis, ut præfertur, direct' et deliberat', minimè curantes, sed machinantes ipsum THOMAM minus ritè prægravare, et in prosecutione scilicet

\* [ 240 ]

A declaration in an action on the case against the sheriff of Middlesex for a false return, stating, that THE PLAINTIFF sued out a *capias* in the king's bench, directed to the defendant, by virtue of which he arrested the party, and at the return of the writ returned *cepi corpus et paratum habeo*, but had not the body there at the return of the writ. The defendant pleads the 23. Hen. 6. c. 10. and that he took bail, and so let the party go at large. The plaintiff, protesting that the defendant had not taken sufficient surety for the appearance of the party, pleads that they had not the body at the return of the writ. The plaintiff demurs. Judgment for the defendant.

S. C. 1. Freeman. 209. 225.  
S. C. 2. Mod. 83.  
1. Roll. Abr. 92. 807.

\* [ 241 ]

Cro. Eliz. 460.  
624.  
Moore, 428.  
2. Saund. 60.

1. Sid. 23. 439. 1. Lev. 86. 6. Mod. 122. 1. Salk. 99

*ſuæ prædictæ penitus frustrare, et de aſſecutione et obtentione prædictæ.*  
 34 librarum omnino impedire, prædictæ. SAMUELEM in cuſtodiam ſuâ in formâ prædictæ. detent. exiſtent. (eodem THOMA de prædictæ. 34 libris ſeu aliquo denario inde minimè ſatisfacto) ſine licentiâ et contra voluntatem ipſius THOMÆ viceſimo ſecundo die Septembris ann. 26 ſupradicto, apud Weſtm. præd. extra cuſtodiam ipſorum HENRICI et ROBERTI tunc vicecom. com. prædictæ. exiſtent. ad largum quo voluit liberè et voluntariè ire et evadere permiſerunt, et nihilominus ad præd. diem returni præcepti præd. ipſi prædictæ. HENRICUS et ROBERTUS vicecom. præd. com. Midd. ut præſertur, exiſtentes, in prædictæ. cur. dicti dom. regis, coram ipſo rege apud Weſtmonaſter. prædictæ. in ipſius THO. grave damnum et præjudicium falſo et fraudulenter returnaverunt præceptum prædictæ. in formâ ſequente, viz. “ quòd ipſi virtute cujuſdam brevis ſibi directi. ce-  
 “ piſſent corpus prædictæ. SAMUELIS, cujus quidem corpus addim  
 “ et locum in eodem præcept. content. cor. dicti. domino rege parat. ha-  
 “ buerunt prout per idem præcept. ſibi præcipiebatur,” ubi revera prædictæ. HENRICUS et ROBERTUS CORPUS PRÆDICTI SAMUELIS ad locum in præcept. prædictæ. content. non parat. habuerunt, juxta exigentiam præcept. prædictæ. et return. ſuum prædictæ. ſed prædictus SAMUEL poſt evaſionem ſuam prædictæ. ſeiſum ad loca eidem THOMÆ penitus incognita elongavit et retraxit, quorum prætext. idem THO. non ſolum in proſecutione ſectæ ſuæ prædictæ. manifeſto retardatus exiſtit, verumetiam de obtentione prædictæ. 34 librarum ei, ut præſertur, debet. omnino impeditus et defraudatus exiſtit, ad dampnum ipſius THO. 43 librarum et inde producit ſectam. Et prædicti HENRICUS et ROBERTUS per JOH. TISLER attornatum ſuum veniunt et defendunt vim et injuriam quando, &c. et dicunt quod prædictus THO. actionem ſuam prædictam inde verſus eos habere ſeu manuteneri non debet, quia dicunt quod cum per quendam actum in parlamento domini HENRICI nuper regis Angliæ, &c. ſexti poſt Conqueſtum, apud Weſtmonaſter. in com. Midd. 24 die Februarii anno regni ſui 23. tent. editum, inter alia inactitatum exiſtit  
 \* [ 242 ] autoritate ejusdem parlamenti quòd vicecomes, ſub-vicecomes, \* clericus vicecom. ſeneſchallus ſive ballivus franchiseſiæ vel ballivus ſive coronator non caperet aliquid colore officii per ipſum nec per aliquam perſonam ad ejus uſum de aliquâ perſonâ pro confeſtione alicujus return. ſive panell. et pro copiâ ejusd. panell. præterquam 4 denarios; et quòd prædictæ. vicecomes et omnes alii officiar. et miniſtri prædicti emitterent extra priſonam, ANGL. ſhould let out of priſon, omnimodas perſonas per ipſos vel eorum aliquos arreſtat. ſeu exiſtent. in eorum cuſtodiam vigore alicujus brevis billæ ſive warrant. in aliquâ actione perſonali vel cauſâ indiſtamenti pro tranſgreſſione, ſuper rationabili ſecuritate ſufficientium perſonarum habentium ſufficiens infra com. ubi tales perſonæ ſint ad ballium ſive manucaptionem tradit. ad cuſtod. dies ſuos in talibus locis, prout prædictæ. brevia, billæ ſive warranta requirerent, tali perſonâ ſive perſonis quæ fuit vel forent in eorum cuſtodiam per condemnation. execution. cap. utlagatum ſive excommunicat. et pro ſecuritate pacis, et omnibus talibus perſonis quæ forent commiſſ. ad cuſtod. per ſpeciale mandatum aliquorum juſticiariorum, et vagrantibus recuſantibus ad ſerviendum ſecundum ſervam ſtatui

de Laboratoribus tantummodo exceptis, prout per actum præ-  
plenius apparet. Etiamdem HENRICUS et ROBERTUS ulterius  
quod ipsi decimo quarto die Julii anno regni dicti dom. regis  
Etc. vicesimo sexto supradicti. in dictâ narratione superius spe-  
iisdem HENR. et ROBERTO tunc vicecom. com. præd. exis-  
is, apud parochiam S. Clementis Danorum in com. prædicti.  
nt et arrestaverunt prædictum SAMUELEM WADHAM vir-  
æcepti prædicti in narratione prædicti. superius specificat. ac  
ad prisonam dicti dom. regis sub custodiâ vicecom. com. præd.  
visten. tunc et ibidem commiserunt, prædictoque SAMUELE sub  
â prædicti. HENR. et ROBERTI existent. pro eâdem causâ, et  
ullâ aliâ causâ, prædicti. SAM. WADHAM postea et ante  
æcepti illius, scil. prædicto decimo quarto die Julii  
vicesimo sexto supradicti apud paroch. prædicti. in com.  
et. invenit et obtulit prædicti. HENRICO et ROBERTO adtunc  
n. com. prædicti. existentibus rationabilem securitatem sufficien-  
ersonarum habentium sufficiens infra com. prædicti. Middlesex  
vandum diem suum prædicti. in præcepto prædicti. superius spe-  
ad respond. præfato THO. de placito transgressionis ac etiam  
ipsius THO. versus præfatum SAMUELEM pro triginta qua-  
ibris super assumptionem secundum consuetudinem cur. ipsius  
regis coram ipso rege exhibend. secundum exigentiam præcepti  
viz. WILLIELMUM KING de \* paroch. Sancti Martini in  
is in com. Middlesex generos. et THO. WILLIAMS de eâdem  
n. in com. prædicti. taylor; qui quidem WILLIELMUS  
et THO. WILLIAMS eundem SAMUELEM adtunc manuca-  
btulerunt quod ipse idem SAM. WADHAM compareret coram  
lom. rege apud Westmon. die Veneris prox. post tres septimanas  
Mich. prox. sequent. ad respondend. præfat. THO. PAGE de  
transgressionis et billæ prædicti. in narratione prædicti. supe-  
specificat. secundum formam et effectum actûs prædicti. Et idem  
r. et ROBERTUS ulterius dicunt, quod postea et ante retur-  
æcepti prædicti, scil. prædicto decimo quarto die Julii ann.  
no sexto supradicti iisd. HENR. et ROBERTO tunc vicecom.  
præd. existen. apud paroch. Sancti Clementis Danor. præd.  
statut. præd. cep. de præfat. SAMUELE rationabilem securi-  
prædicti. viz. WILLIELMUM KING et THO. WILLIAMS;  
idem WILLIELMUS KING et THO. WILLIAMS iisdem die  
no apud paroch. prædicti. Sancti Clementis Danor. in com.  
et. per quoddam scriptum suum obligatorium sub sigill. prædic-  
VILLIELMI KING et THO. WILLIAMS, cujus dat. est de-  
quarto die Jul. ann. vicesimo sexto supradicti. concessissent et  
et eorum concessit se teneri præfato HENRIC. et ROBERT. ut  
m. com. præd. in summâ 70 librar. bonæ et legalis monetæ  
æ cum conditione eidem script. obligator. subscript. quod  
et. SAMUEL. compareret coram dicto dom. rege apud West-  
mon. prædicti. die Veneris prox. post tres septimanas Sancti Michaelis  
sequent. ad respondend. præfato THO. PAGE de placit. trans-  
missis et billæ prædicti. secundum exigentiam præcepti prædicti, et  
inde adtunc et ibid. emisit præfat. SAM. extra prisonam  
dicti. secundum formam statuti prædicti. ut eis bene licuit, quæ est  
ad largum ire permissio prædicti. unde præd. THO. PAGE

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againſt  
TULSE.

*superius verſus eos queritur. Et ulterius iidem HENR. et ROBERT. dicunt quòd ipſi poſtea, ſcil. ad diem returni ejusdem præcepti coram dicto dom. rege apud Weſtmonaſt. prædicti. iidem HENR. et ROBERT. tum vicecom. com. præd. exiſtent. returnaverunt præceptum prædictum quòd ipſi virtute præcepti prædicti cepiſſent præſatum SAMUELEM cujus corpus coram dicto dom. rege ad diem et locum in eodem præcept. content. parat. habuerunt, prout per idem præcept. præcipiebatur, et hoc parati ſunt verificare, unde petunt judicium et damna ſua occasione prædicti. ſibi adjudicand. Et prædicti. THO. PAGE, dicit quòd ipſe per aliqua per prædicti. HENRIC. et ROBERT. ſuperius placitando allegat. ab actione ſua prædicti. verſus præd. HENR. et ROBERT. præcludi non debet, \* quia proteſtando quid prædicti HENR. et ROBERT. non ceperunt ſecuritatem ſufficientiam perſonarum pro comparentiâ prædicti. SAMUELIS ad diem et locum in præcepto præd. ſuperius ſpecificat. prout præd. HENR. et ROBERT. ſuperius placitando allegaverunt, pro placito idem THOM. dicit quòd iidem HENR. et ROBERT corpus præſati SAMUELIS ad diem et locum in præcept præd. content. cor. dicto dom. rege non parat. habuerunt juxta exigentiam præcepti prædicti. et returnum ſuum prædicti. et hoc paratus eſt verificare, unde petit judicium et damna ſua occasione præmiſſorum ſibi adjudicari.*

The defendants demur to this replication, and the plaintiff joins in demurrer.

An action will  
not lie againſt  
a ſheriff for  
taking inſufficient  
bail.

32 Hen. 6.  
pl. 28.

Vide ante, 57.

227. pl. 17.

2. Inſt. 376.

F. N. B. 25.

Gilb. C. B. 32.

Tidd's Pract.

111.

1. H. Bl. Rep.

C. B. 463.

SERJEANT STRODE, *for the defendant.* Before the ſtatute of *Weſtmiñſter* 2. cap. 10. no man could make an attorney without the king's writ *de attornato faciendo*; and there was no other return at the common law than "*cepi corpus*," or "*non eſt inventus*." The ſtatute of 23. Hen. 6. c. 9. doth not alter the return; the deſign of that ſtatute is only to provide for the defendant's caſe, and againſt the extortion of ſheriffs and their officers: ſo that the ſheriff being obliged to return a *cepi* and yet to let the defendant to bail, there can be no reaſon why he ſhould be charged for not having the body at the day; and he cited *Langton v. Gardner* (a), *Barton v. Aldworth* (b), the caſe of *Bowles v. Laſſel* (c). The ſheriff took bail according to this ſtatute, and returned a *languidus in priſonâ* though the defendant was at large: reſolved that no action lay againſt the ſheriff. In *Roll's Abridgment* (d) no action lies againſt the ſheriff for not having the body at the day, becauſe he is compellable by the ſtatute to let him to bail; and ſo he ſaid it was reſolved in a caſe between *Franciſyn v. Andrews* (e), but adjudged for the plaintiff upon the inſufficiency of the pleading.

SERJEANT CONYERS, *for the plaintiff.* I agree that an action of *escape* will not lie againſt the ſheriff, becauſe he is compellable to let him to bail; but this is an action at the common law for a *fulſe return*, which if it ſhould not be maintainable, the deſign of

(a) Cro. Eliz. 460. Moor, 428.

(d) 1 Roll. Abr. 92.

(b) Cro. Eliz. 624.

(e) 1 In B. R. 24. Car. 1.

(c) Cro. Eliz. 852. Noy, 39.

## Easter Term, 29. Car. 2. In C. B.

the statute would be defrauded: for the plaintiff cannot control the sheriff in his taking bail, but he may take what persons and what bail he pleaseth: and if he should not be chargeable in an action for not having the body ready, the plaintiff could never have the effect of his suit: \* and although the sheriff be chargeable, he will be at no prejudice; for he may repair his loss by the bail-bond: and it is his own fault if he take not security sufficient to answer the debt. The last clause in the statute is, "That if any sheriff return a *cepi corpus* or *reddidit se*, he shall be chargeable to have the body at the day of the return, as he was before, &c." That "if" implies a liberty in the sheriff not to return a *cepi corpus* or *reddidit se*.

PAGE  
against  
TULSE.

\* [ 245 ]  
Vide ante, 54.  
55.

But notwithstanding, by the opinion of NORTH, Chief Justice, WYNDHAM, and ATKINS, Justices, the plaintiff was barred. The case of *Bowles v. Lassel*, they said, was a strong case to govern the point; and the return of *paratum habeo*, is in effect no more than that he had the body ready to bring into court, when the Court should command him; and it is the common practice only to amerce the sheriff till he does bring the body (a): and therefore no action lies against him; for it is not reasonable that he should be twice punished for one offence, and that against the court only. SCROGGS delivered no opinion: but judgment was given, *ut supra*, for the defendant.

2. Saund. 59.  
2. Mod. 177.  
4. Burr. 198a.

(a) Impey's  
Pract. 155.  
Tidd's Pract.  
159.

## Cockram, Executor, against Welby.

Case 5.

**ACTION** UPON THE CASE against a sheriff, For that he levied such a sum of money upon a *feri facias* at the suit of the plaintiff, and did not bring the money into court at the day of the return of the writ, *per quod deterioratus est et damnum habet, &c.* The defendant pleads the statute of 21. Jac. 1. c. 16. of Limitations. To which the plaintiff demurs.

The statute of Limitations cannot be pleaded to an action of debt brought against a sheriff for money levied under a *feri facias*.

**BARRELL, Serjeant.** This action is within the statute. It ariseth *ex quasi contractu*: *Speake v. Richards*, Hob. 206. It is not grounded on a record; for then *nullum tale recordum* would be a good plea; which it is not: It lies against the executors of a sheriff, which it would not do if it arose *ex maleficio*.

S. C. Freem.  
236.  
S. C. 2. Mod.  
212.  
S. C. 2. Show.  
79.  
5. Mod. 308.  
8. Mod. 171.  
2. Ld. Ray.  
935. 1204.  
1. Peer. Wms.  
742.  
2. Peer. Wms.  
144.

**PEMBERTON.** This action is not brought upon the contract. If we had brought an *indebitatus assumpsit*, which perhaps would lie, then indeed we had grounded ourselves upon the contract, and there had been more colour to bring us within the statute; but we have brought an action upon the case, for not having our money here at the day, *per quod, &c.*

\* NORTH, Chief Justice. An *indebitatus assumpsit* would lie, in this case, against the sheriff or his executor; and then the statute would be pleadable. I have known it resolved, that the statute

\* [ 246 ]

## Easter Term, 29. Car. 2. In C. B.

**COCHRAN**  
**against**  
**WELBY.**

tute of Limitations is not a good plea against an attorney that brings an action for his fees, because they depend upon a record here, and are certain.

1. Cro. 540.  
513. 533.  
1. Saund. 38.  
Styles 214.

This ensuing *Trinity Term*, the matter being moved again, THE COURT gave judgment for the plaintiff, *nisi causa, &c.* If the *feri facias* had been returned, then the action would have been grounded upon the record, and it is the sheriff's fault that the writ is not returned: but, however, the judgment in this court is the foundation of the action. Debt upon the statute of 2. *Edw.* 6. c. 13. for not setting out tithes, is not within the statute, for *eritur ex maleficio*: so the ground of this action is *maleficium*, and the judgment here given; in both which respects it is not within the statute of Limitations.

### Case 6.

### *Barrow against Parrot.*

If an infant *feme covert*, with intent to levy a fine to the uses of herself and husband, declare herself of age, when examined by commissioners under a *dedimus potestatem*, when in fact she was greatly under age, yet *the fine* cannot be set aside, although there is strong ground that the examination was collusive.

S. C. 2. Vent. 30.  
Ante, 48.  
Post. 252.  
3. Lev. 36.

\* [ 247 ]  
10. Mod. 43.  
179. 245. 436.  
11. Mod. 181.  
196. 210.  
12. Mod. 444.  
Abr. Eq. 283.  
258.  
Fitzg. 114.

PARROT had married one *Judith Barrow*, an heiress. *Sir Herbert Parrot*, his father, and an ignorant carpenter, by virtue of a *dedimus potestatem* to them directed, took the compo- sance of a fine of the said *Judith*, being under age, and by indenture the use was limited to *Mr. Parrot* and his wife for their two lives, the remainder to the heirs of the survivor. About two years after the wife died without issue; and *Barrow*, as heir to her, prayed the relief of the Court.

Upon examination it appeared, that *Sir Herbert* did examine the woman whether she were willing to levy the fine; and asked the husband and her, Whether she were of age or not? Both answered that she was. She afterwards, being privately examined touching her consent, answered as before, and that she had no constraint upon her by her husband; but she was not there questioned concerning her age. *Sir Herbert Parrot* was not examined in court upon oath, because he was accused.

NORTH, *Chief Justice*, said, this court could no more administer an oath *ex officio* than the spiritual court could — NORTH and WYNDHAM. 'There is a great trust reposed in the commissioners, \* and they are to inform themselves of the party's age; and a voluntary ignorance will not excuse them.

But ATKYNS, *Justice*, opposed his being fined. He cited *Hungat's Case* (a), where a fine by *dedimus* was taken of an infant; and because it was not apparent to the commissioners that the infant was within age, they were in that court acquitted.

But NORTH, *Chief Justice*, WYNDHAM, and SCROGGS, *Justices*, agreed, that the son should be fined, for that he could not possibly be presumed to be ignorant of his wife's age. — ATKYNS, *contra*.

Caf. Tem. Talb.  
41. 167.  
2. Silk. 567.  
3. Petr. Wms.

But THEY ALL AGREED, that there was no way to set the fine aside.

206. 208. 235. 1. Ld. Ray. 113. Cowp. 622. 2. Term Rep. 159.

(a) 12. Co. 122, 123.

TRINITY

# TRINITY TERM,

## The Twenty-Ninth of Charles the Second,

I N  
The Common Pleas.

Friday, 15. June 1677.

Sir Francis North, *Knt. Chief Justice.*

Sir Robert Atkins, *Knt.*

Sir Hugh Wyndham, *Knt.*

Sir William Scroggs, *Knt.*

} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

\* [ 248 ]

\* Searle *against* Long.

Cafe 7.

**Q**UARE IMPEDIT *against* two. One of the defendants appears ; the other casts *an effoin* : wherefore he that appeared had *idem dies* : then he that was effoined appears, and the other casts *an effoin*. Afterward *an attachment* issued for their not appearing at the day ; and so process continued to the *great distress* : which being returned, and no appearance, *judgment final* was ordered to be entered according to the statute of *Marlb.* the 52. *Hen.* 3. c. 12. which enacts, that “ in a plea  
“ of *quare impedit*, if the disturber come not at the first day that he  
“ is summoned, nor cast no effoin, then he shall be attached at  
“ another day ; at which day if he come not, nor cast no effoin,  
“ then he shall be attached at another day ; at which day if he come  
“ not, nor cast no effoin, then he shall be distrained by the great  
“ distress ; and if he come not then, by his default, a writ shall go  
“ to the bishop of the same place, that the claim of the disturber

The process in *quare impedit* is summons, attachment, and distress ; and if the defendant do not appear, or cast an effoin, there shall be judgment for the plaintiff ; but unless the defendant be personally served with the summons, and good summoners returned by the sheriff, the judgment

by default shall be set aside.—S. C. 2. Mod. 264. Ante, 197. 1. Vent. 60. 1. Lev. 105. F. N. B. 32. 2. Saund. 35. 45. 2. Inst. 80. 124. 3. Inst. 125. Dyer, 153. 1. Jones, 412. 1. Bulst. 160. Cro. Car. 341. 511. 517. 2. Show. 274. 6. Mod. 4. 51. 1. Salk. 216. 10. Mod. 310. 1. Brownl. 158.

“ for

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SEATTLE  
against  
LONG.

“ for that time shall not be prejudicial to the plaintiff, saving to  
“ the disturber his right at another time, when he will sue there-  
“ fore ; and the same law as to the making of attachments shall  
“ from henceforth be observed in all writs where attachments lie,  
“ as in making distresses ; so that the second attachment shall be  
“ made by better pledges ; and afterwards the last distress.”

PEMBERTON, *Serjeant*, moved to have this rule discharged, Because the party was not summoned, neither upon the attachment nor the *great distress*, and the sureties returned upon the process were *John Doe* and *Richard Roe* : an affidavit was produced of *non-summions*, and that the defendant had not put in any sureties, nor knew any such persons as *John Doe* and *Richard Roe*.

It was objected on the other side, That they had notice of the suit ; for they appeared to the summons ; and it appeared that they were guilty of a voluntary delay, in that they fourched in *essoins* ; and the statute of *Marlbridge* is peremptory : wherefore they prayed judgment.

MAYNARD, *Serjeant*, for the defendants. If judgment be entered against us, we have no remedy but by a writ of deceit. Now in a writ of deceit the *sumners* and *veyors* are to be examined in court ; and this is the trial in that action : but feigned persons cannot be examined. It is a great abuse in the officers to return such feigned names. The first cause thereof was the ignorance of *sheriffs*, who being to make a return, looked into some book of precedents for a form ; and finding the names of *John Doe* and *Richard Roe* put down for examples, made their return accordingly, and took no care for true sumners and true manucaptors. For non-appearance at the return of the *great distress* in a plea of *quare impedit*, final judgment is to be given, and our right bound for ever ; which ought not to be suffered, unless after process legally served, according to the intention of the statute. In a case in *Michaelmas Term* the twenty-third of the present king, *Vivian v. the Bishop of London*, judgment was entered in this court in a plea of *quare impedit*, upon non-appearance to the *great distress* ; but there the party was summoned, and true summoners returned ; upon non-appearance an attachment issued, and real sumners returned upon that : but upon the distress it was returned, that the defendants *districli fuerunt per bona et catalla, et manucapti per John Doe et Richard Roe* : and for that cause the judgment was vacated.

• [ 249 ]

THE COURT. The design of the statute of *Marlbridge* was to have process duly executed, which if it were executed as the law requires, the tenant could not possibly but have notice of it. For if he do not appear upon the summons an attachment goes out ; that is a command to the *sheriff* to seize his body, and make him give sureties for his appearance : if yet he will not appear, then the *great distress* is awarded ; that is, the *sheriff* is commanded to seize the thing in question : if he come not in for all this, then judgment  
final

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*final* is to be given. Now the issue of this process being so fatal that the right of the party is concluded by it, we ought not to suffer this process to be changed into a thing of course. It is true, the defendant here had notice of the suit; but he had not such notice as the law allows him. And for his fourching in effoin, the law allows it him. Accordingly the judgment was set aside.

SEARLE  
against  
LONG.

Anonymous.

Cafe 8.

**F**ALSE JUDGMENT out of a county court. The record was vicious throughout, and the judgment reversed; and ordered, that the suitors should be amerced *a mark*: but the record was so imperfectly drawn up, that it did not appear before whom the court was held; and the county-clerk was fined five pounds for it.

The court of king's bench may fine a county-clerk for negligence. 8. Co. 40. Dougl. 194.

2. Inst. 55. 12. Mod. 16. Cases in Crown Law, 2d edit. 183, 184.

Anonymous.

Cafe 9.

**C**ESSAVIT PER BIENNIUM (*a*). The defendant pleads "*non tenure*." He commenceth his plea, "*quod petenti reddere non debet*:" but concludes *in abatement*.

*Non tenure* when pleaded to the tenure is in bar, but when pleaded to the tenancy it is in abatement.

\* BARRELL, *Serjeant*. He cannot plead this plea, for he has imparled.

THE COURT. Non-tenure is a plea in bar: the conclusion, indeed, is not good, but he shall amend it.

\* [ 250 ]  
Ante, 181.  
1. Ld. Ray.  
229. 476.  
4. Bac. Abr.  
105.

BARRELL, *Serjeant*. Non-tenure is a plea in abatement. The difference is betwixt non-tenure that goes to the tenure (as when the tenant denies that he holds of the demandant, but says that he holds of some other person, which is a plea in bar), and non-tenure that goes to the tenancy of the land; as here he pleads, that he is not tenant of the land; and that goes in abatement only.

The defendant was ordered to amend his plea.

(*a*) This writ was given by the Second, 13. Edw. 1. c. 21. See Statute of Gloucester, 6. Edw. 1. c. 4. 2. Inst. 295. F. N. B. 208. and the statute of Westminster the

Addison against Sir John Otway.

Cafe 9\*.

**T**ENANT IN TAIL of land in the parishes of *Rippon* and *Kirby-Marlestone*, in the towns of *A. B.* and *C.* The tenant in tail makes a deed of bargain and sale to *J. S.* to the intent to make *J. S.* tenant to the *præcipe*, in order to the suffering of a common recovery of so many acres in the parishes of *Rippon* describing them as lying in *Dale* generally, although the covenant describe them as lying in the parish of *Dale*.—S. C. Freem. 227. 235. 240. S. C. 2. Mod. 233. S. C. 3. Keh. 771. S. C. 2. Vent. 31. Ante, 47. 78. 208. 246. Allen, 88. 1. Co. 58. 8. Co. 155. 11. Co. 25. Co. Lit. 225. Hoh. 224. Cro. Jac. 263. Comyns, 386. 2. Mod. 47. 236. 8. Mod. 276. 4. Burr. 2510. Cowp. 346.

Lands lying in the parish of *Dale*, but out of the will of *Dale*, shall pass by a fine and recovery.

and

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ADDISON  
against  
SIR JOHN  
OTWAY.

and Kirby-Marlestone. Now in those parishes there are two towns called Rippon and Kirby-Marlestone; and the recovery is suffered of lands in Rippon and Kirby-Marlestone generally: all this was found by special verdict. And further, that the intention of the parties was, that the lands in question should pass by the said recovery; and that the lands in question are in the parishes of Rippon and Kirby-Marlestone, but not within the townships; and that the bargainor had no lands at all within the said townships.

The question was, Whether the lands in question should pass by this recovery, or not?

• [ 251 ]

SHAFTOE. They will pass. The law makes many strained constructions to support common recoveries, and abates of the exactness that is required in adversary suits; as in *Dormer's Case* (a), in *Eare v. Snow* (b), in *Sir Moyle Finch's Case* (c), and in *Ferrers v. Curson* (d). In the case of *Stork v. Foxe* (e), where two villis, Walton and Street, were in the parish of Street, and a man having lands in both, levied a fine of his lands in Street, his lands in Walton would not pass: but there the consor had lands in the town of Street to satisfy the grant. But in our case it is otherwise. He cited, also, *Roll. Abr. "Grants" 54.* and the case of *Baker v. Johnson, Hutton, 105.* The deed of bargain and sale and the recovery make up in our case but one assurance, and construction is to be made of both together; as in *Cromwell's Case* (f). The intention of the party is to rule in fines and recoveries, and the intention of the parties in our case appears in the deed, and is found by the verdict: 2. *Roll. Abr. 19. Winch. 122. per Hobart; Cro. Car. 308, Sir George Symond's Case:* betwixt which last case and ours all the difference is, that that case is of a fine and ours of a common recovery; betwixt which conveyances, as to our purpose there is no difference at all. He cited *Jones v. Wait* in Trinity Term, 27. Car. 2. in this court, and a case of *Thynne v. Thynne, 16. Car. 2.* in the King's Bench when HYDE was Chief Justice.

See the case of  
Maffey v. Rice,  
Cowp. 349.

NORTH, Chief Justice. The law has always stuck at new niceties that have been started in cases of fines and common recoveries, and has gotten over almost all of them. I have not yet seen a case that warrants the case at bar in all points; nor do I remember an authority expressly against it, and it seems to be within the reason of many former resolutions. But we must be cautious how we make a further step.

WYNDHAM, Justice. I think the lands in question will pass well enough; and that the deed of bargain and sale which leads the uses of the recovery, does sufficiently explain the meaning of

(a) 2. Roll. 67. 5. Co. 40.

(b) Plowd. 514. 18. Viner Abr. 214.

(c) 6. Co. 63. Co. Ent. 591.

2. Leon. 134.

(d) Cro. Jac. 643.

(e) Cro. Jac. 120, 121. 2. Roll.

Abr. 54.

(f) 2. Co. 69. Jenk. 252. 2. Andr.

69. Moor, 471. Savil, 115. Ch.

Litt. 103.

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the words *Rippon and Kirby-Marlestone*, in the recovery. I do not so much regard the jury's having found what the party's intention was, as I do the deed itself, in which he expresses his own intention himself: and upon that I ground my opinion.

ADDISON  
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SIR JOHN  
OTWAY.

ATKINS, *Justice*, agreed with WYNDHAM. Indeed when a place is named in legal proceedings, we do *primâ facie* intend it of a vill if nothing appear to the contrary; *Stabitur præsumptioni donec probetur in contrarium*. In this case the evidence of the thing itself is to the contrary: the reason why *primâ facie* we intend it of a vill, is, because as to civil purposes the kingdom is divided into vills: we do not intend it of a parish, because the division of the \*kingdom into parishes is an ecclesiastical distribution to spiritual purposes. But the law in many cases takes notice of parishes in civil affairs, and custom having by degrees introduced it, we may allow of it in a recovery as well as in a fine.

[ 252 ]

SCROGGS *accordant*. If an infant levy a fine, when he becomes of full age he shall be bound by the deed that leads the uses of the fine, as well as by the fine itself, because the law looks upon both as one assurance.—So THE COURT was of opinion, that the lands did pass.

IT WAS THEN SUGGESTED, That judgment ought not to be given notwithstanding, for that the plaintiff was dead (a).—But they said they would not stay judgment for that, as this case was; for between the lessor of the plaintiff and the defendant there was another cause depending, and tried at the same assizes when this issue was tried; and by agreement between the parties the verdict in that cause was not drawn up, but agreed that it should ensue the determination of this verdict, and the title to go accordingly. Now the submission to this rule was an implicit agreement not to take advantage of such occurrences as the death of the plaintiff in an ejectment; whom we know to be no wife concerned in point of interest, and many times but an imaginary person.

The death of the plaintiff in ejectment shall not abate the action, especially if there be another person of the same name; for the court will take notice that it is the lessor of the plaintiff who is concerned in interest.

It was said also to have judgment, that there lived in the county where the lands in question are, a man of the same name with him that was made plaintiff.—This THE COURT said was sufficient, and that were there any of that name, *in rerum naturâ* they would intend that he was the plaintiff.

5. Mod. 33.  
1. Sid. 24.  
3. Keb. 372.  
12. Mod. 653.  
2. Stra. 899.  
1056.  
1. Ld. Ray. 244.  
Run. Eject. 139.  
Salk. 260.

PER CURIAM. We take notice judicially, that the lessor of the plaintiff is the person interested, and therefore we punish the plaintiff if he release the action or release the damages.—Accordingly judgment was given.

(a) By 17. Car. 2. c. 8. the death of either party between verdict and judgment shall not be alledged for error, so as judgment be entered within two Terms after the verdict. If the judg-

ment be signed, though not entered on the roll, or if the death happen after the commencement of the assizes, though before trial, it is within the remedy of the statute. 1. Sid. 385. 1. Salk. 8.

Anonymous.

Cafe 10.

\* Anonymous.

If two actions be brought against an heir on two several bonds by his ancestor, the plaintiff who first signs judgment shall have priority of execution, although his action was not first commenced.

Ante, 2.

Keilw. 63.

22. Mod. 146.

1. Ld. Ray. 252.

1. Peer. Wms.

295.

3. Peer. Wms.

399.

3. Bac. Ab. 26.

2. Term Rep.

729.

4. Term Rep.

402.

**D**EBT UPON AN OBLIGATION was brought against the heir of the obligor; hanging which action, another action was brought against the same heir upon another obligation of his ancestor. Judgment is given for the plaintiffs in both actions: but the plaintiff in the second action obtains judgment first: and Which should be first satisfied? was the question.

**BARRELL, Serjeant.** He shall be first satisfied that brought the first action.

**NORTH, Chief Justice.** It is very clear, that he for whom the first judgment was given shall be first satisfied; for the land is not bound till judgment be given (a). But if the heir, after the first action brought, had aliened the land which he had by descent (b); and the plaintiff in the second action, commenced after such alienation, had obtained judgment, and afterward the plaintiff in the first action had judgment likewise; in that case the plaintiff in the first action should be satisfied, and he in the second action not at all.

**BARRELL, Serjeant.** What if the sheriff return in such a case, that the defendant has lands by descent, which in fact are of his own purchase?—**NORTH, Chief Justice.** If the sheriff's return cannot be traversed, at least the party shall be relieved in an ejectment.

(a) *Sed vide* the case of *Gree v. Oliver*, Carth. 245. where it is said, that this case is not law. But by 29. Car. 2. c. 3. s. 14. & 15. "Any judge or officer of the courts at Westminster, that shall sign any judgments, shall at the signing of the same set down the day of the month and year of his so doing upon the paper-book, docket, or record, which he shall sign; which shall also be entered on the margin of the roll: and such judgments as against purchasers bona fide for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall in consideration

"of law be judgments only from such time as they shall be so signed, and shall not relate to the first day of the Term whereof they are entered, or the day of the return of the original, or filing the bail: and no writ of *facias*, or other writ of execution, shall bind the property of the goods, but from the time that such writ shall be delivered to the sheriff."

(b) By 3. & 4. Will. & Mary, c. 24. s. 5. "If any heir liable to pay the debt of an ancestor, in regard of lands, &c. descending upon him, shall alien them before action brought, he shall be liable to the amount of their value."

Cafe 11.

The King against Thorneborough and Studly.

A recovery in *quare impedit* against a clerk whom the king presented by usurpation avoids the usurpation.

Ante, 204. 230.

248. Post. 276.

519. 1. Leon. 226.—Jones, 46.

**T**HE KING brought a *quare impedit* against the Bishop of and Thorneborough and Studly; and declares, That *Queen Elizabeth* was seised in fee of the advowson of *Redriff*, in the county of *Surrey*, and presented *J. S.*: that the queen died, and the advowson descended to *King James*, who died seised, &c. and brings down the advowson by descent to the king that now is. *Thorneborough* the patron pleads a plea in bar; upon which the

2. Roll. Abr. 370. 6. Co. 29. 5. Co. 59. Co. Lit. 344. Cro. Eliz. 148. Vaugh. 14. Hob. 316.

king

demurs. *Studly* the incumbent pleads, confessing *Queen Elizabeth's* seisin in fee in right of her crown; but says, that she, second year of her reign, granted the advowson to one *Bosbill*, granted to *Ludwell*, who granted to *Danson*, who granted to *Stone*, who granted to *Thorneborough*, who presented the last *Studly*; and traverseth, ABSQUE HOC that *Queen Elizabeth* died.

THE KING  
against  
THOMAS BOS-  
BOROUGH AND  
STUDLY.

The defendant's counsel produced the letters patents made by *Elizabeth* in the second year of her reign to *Bosbill* and his

The king's counsel gave in evidence a presentation made by *Elizabeth* by usurpation in the thirty-fourth year of her reign of one *Rider*, by which presentation the advowson was again in THE CROWN. The presentation was read in which wherein the queen recited that the church was void, that it appertained to her to present.

WORTH, *Chief Justice*. Is not the queen deceived in this presentation? for she recites, that it belongs to her to present, which is not true. If the queen had intended to make an usurpation and her clerk had been instituted, she had gained the fees; but here she recites, that she had right.

RAYNARD, *Serjeant*. When the king recites a particular title, which is no such title, his presentation is void; but not when his recitation is general, as it is here. And this difference was agreed at the king's bench, in the case of one *Erasmus Dryden*.

The defendant's counsel shewed a judgment, in a *quare impedit*, that the same *Rider*, at the suit of one *Wingate*, in *Queen Elizabeth's* time; whereupon the plaintiff had a writ to the bishop, that *Rider* was ousted. *Wingate* claimed under the letters patent of the second of the queen, viz. by a grant of one *Adie* to himself; to which *Adie* one *Ludwell* granted it, in the thirty-third year of *Queen Elizabeth's* reign.

LDWIN, *Serjeant*. It appears by the record of this judgment, that the writ to the bishop was awarded; but no final judgment is given, which ought to be after the three points of the writ inquired.

WORTH, *Chief Justice*. What is it that you will call the final judgment? There are two judgments in a *quare impedit*; one, which the plaintiff shall have a writ to the bishop, which is the judgment, that goes to the right betwixt the parties; and another judgment at the common law. There is another \* judgment given for the damages since the statute of *Westminster* 2. c. 5. 5. Co. 59. a. the points of the writ are inquired of; which judgment is to be given but at the instance of the party. \* [ 255 ]

AMBERTON. This *Wingate* who recovered was a stranger, and no title to have a *quare impedit*. Now I take this difference; Where the king has a good title, no recovery against his title shall affect the king's title; he shall not be prejudiced by a writ. I. S recovery

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THE KING  
against  
THOMAS  
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recovery to which he is no party. If the king have a defeasible title, as in our case, by usurpation; there, if the rightful patron recover against the king's incumbent, the king's title shall be bound, though he be not a party; for his title having no other foundation than a presentation, when that is once avoided, the king's title falls together with it. But though the king's title be only by usurpation, yet a recovery against his clerk by a stranger, who has nothing to do with it, shall not prejudice the king: covin may be betwixt them, and the king betried. Now *Wingate* had no right; for he claimed by grant from one *Adie*, to whom *Ludwell* granted in the thirty-third year of *Queen Elizabeth*. But we can prove this grant by *Ludwell* to have been void; for in the twenty-ninth year of the queen he made a prior grant to one *Danfon*, of which grant we here produce the inrolment. This grant to *Danfon* was an effectual grant; for in the eleventh year of *James the First* a presentation was made by *J. R.* and *Thomas Danfon*, which proves that this grant took effect; and the defendant himself deduceth the title of his own patron under that grant.

*BARRELL, Serjeant.* *Wingate* is not to be accounted a stranger; for he makes title by the letters patents granted in the second year of *Queen Elizabeth*; so that he encounters the queen with her own grant: and his title under that grant was allowed by the Court, who gave judgment accordingly. There was no *feint pleader* in the case, as appears by the record that has been read; and covin shall not be presumed if it be not alledged. We deduce our title under the grant made to *Danfon* in the twenty-ninth year of *Queen Elizabeth* in our plea; but that is only by way of inducement to our traverse.

*PER CURIAM.* By the judgment in the time of *Queen Elizabeth* the queen's title was avoided. We must not presume that *Wingate* had a title. *Ex diuturnitate temporis omnia presumuntur solemniter esse acta.* That *quare impedit* was brought when the \* matter was fresh. Without doubt *Danfon* would have asserted his title against *Wingate*, if he had had any. The defendant did not do prudently in conveying a title to his patron, under the grant made to *Danfon*: but issue being taken upon the queen's dying seised, he shall not be concluded to give in evidence any other title to maintain the issue. Upon which evidence the jury found for the defendant, That *Queen Elizabeth* did not die seised.

*NORTH, Chief Justice,* said, he was clearly of opinion, That the king's title, by usurpation, should be avoided by a recovery against his clerk, though the recoveror were a meer stranger.

By 7. Ann. c. 18. no usurpation shall displace the estate or interest of any intitled to an advowson, or turn it to a right; but such person so intitled may present, or have a *quare impedit* on the next or any subsequent avoidance, as if no usurpation had been.

The

The Company of Stationers *against* Seymour.

Cafe 12.

THE COMPANY OF STATIONERS brought an action of debt against *Seymour*, for printing *Gadbury's Almanack* without their leave. Upon a special verdict found, the question was, Whether the letters patents, whereby the *Company of Stationers* had granted to them the sole printing of almanacks, were good, or not?

A royal patent to the Stationers Company, granting them the exclusive right of printing almanacks, is bad.

The jury found the statute of 13. & 14. *Car. 2. c. 33. (a)* concerning printing. They found a patent, made by *King James*, of the same privilege to the Company, in which a former patent of *Queen Elizabeth* was recited; and they found the letters patents of the king that now is. Then they found, that the defendant had printed an almanack, which they found *in verbis et figuris*; and that the said almanack had all the essential parts of the almanack that is printed before "The Book of Common Prayer;" but that it has some other additions, such as are usual in common almanacks, &c.

S. C. 3. Keb. 792.  
Carter, 89, 90.  
2. Show. 259.  
1. Vern. 120.  
275.  
10. Mod. 105.  
131.  
-kin. 233.  
3. Mod. 77.  
Moor, 673.  
Noy, 173.  
2. Ch. Cases, 76 93.  
3. M. d. 75.  
2. Inst. 744.  
4. Bac. Abr. 210. notis.  
1. Hawk P. C. 475.  
4. Burr 662.  
2. Bl. Com. 420.  
1. Bl. Rep. 105. 328.

PEMBERTON, *Serjeant*. The king may by law grant the sole printing of almanacks. The art of printing is altogether of another consideration, in the eye of the law, than other trades and mysteries are. The press is a late invention; but the exorbitancies and licentiousness thereof has, ever since it was first found out, been under the care and restraint of the magistrate; for great mischiefs and disorder would ensue \* to the commonwealth, if it were under no regulation; it has therefore always been thought fit to be under the inspection and controul of the government; and the statute of the 13. & 14. *Car. 2. c. 33.* recites, that it is a matter of public care. In *England*, it has from time to time been under the king's own regulation, so that no book could lawfully be printed without an *imprimatur*, granted by some that derive authority from him to license books. But the question here is not, Whether the king may, by law, grant the sole printing of all books; but of any, and of what sort of books? The sole printing of *law-books* is not now in question; that seems to be a point of some difficulty, because of the large extent of such a patent, and the uncertainty of determining what should be accounted a *law-book*, and what not; and yet such a patent has been allowed to be good by a judgment in the house of peers (b). When *SIR ORLANDO BRIDGEMAN* was Chief Justice in this court, there was a question raised concerning the validity of a grant of the sole printing of any particular book, with a prohibition to all others to print the same, how far it should stand good against them that claim a property in the copy, paramount to the king's grant; and opinions were divided upon the point. But the defendant, in our case, makes no title to the copy; only he pretends a nullity in our patent. The book which this defendant has printed, has no certain author; and then, according to the rule of our law, the king

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(a) See the Appendix to Mr. Ruffe's edition of the Statutes

(b) This seems to be the case of *Roper*

\* VOL. I.

v. Streater, 2 Ken. 214. See also the case of *Baskin v. the University of Cambridge*, 1. Bl. Rep. 110. 4. Burr. 2116.

\* S 2

has

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THE  
COMPANY OF  
STATIONERS  
again  
SEYMOUR.

has the property; and by consequence may grant his property to the Company.

\* [ 258 ]

THE COURT. There is no difference in any material part betwixt this almanack and that which is put in THE RUBRICK of the common-prayer. Now the almanack that is before the common-prayer proceeds from a public constitution; it was first settled by the *Nicene Council*; is established by the canons of the church; and is under the government of the *Archbishop of Canterbury*; so that almanacks may be accounted *prerogative copies*. Those particular almanacks that are made yearly, are but applications of the general rules there laid down for the moveable feasts for-ever, to every particular year. And, without doubt, this may be granted by the king. This is a stronger case than that of *law-books*, which has been mentioned. The lords, in the resolution of that case, relied upon this, That \* printing was a new invention, and therefore every man could not by the common law have a liberty of printing *law-books*. And since printing has been invented, and is become a common trade, so much of it as has been kept inclosed never was made common: but matters of state, and things that concern the government, were never left to any man's liberty to print that would. And particularly the sole printing of *law books* has been formerly granted in other reigns. Though printing be a new invention, yet the use and benefit of it is only for men to publish their works with more ease than they could before (a): men had some other way to publish their thoughts before printing came in; and so farasmuch as printing has always been under the care of the government since it was first set on foot, we may well presume that the former way was so too.—QUEEN ELIZABETH, KING JAMES, and KING CHARLES THE FIRST, granted such patents as these, and the law has a great respect to common usage. We ought to be guided in our opinions by the judgment of the house of peers; which is express in the point; the ultimate resort of law and justice being to them. There is no particular author of an almanack; and then, by the rule of our law, THE KING has the property in the copy. Those additions of prognostications and other things that are common in almanacks, do not alter the case; no more than if a man should claim a property in another man's copy, by reason of some inconsiderable additions of his own.—Accordingly judgment was given for the plaintiffs, *nisi causa, &c.* (b).

(a) See 3. Ann. c. 19. and the case of Literary Property, 4. Burr.

(b) But see the case of the Stationers Company v. Curman, where, on a case out of chancery, it is certified by the Judges of the Common Pleas—FIRST, That the grant made to the Company by James the First for the exclusive printing of all almanacks allowed by the *Archbishop of Canterbury* and *Bishop of London*,

is restrained to such almanacks onl<sup>y</sup> should be allowed by the said *archbishop* and *bishop*, or either of them, for the time being.—AND, SECONDLY, that the crown has not a prerogative or power to make such a grant to THE COMPANY, exclusive of any other or others. Easter Term, 25. Geo. 3. 2. Bl. Rep. 1009.

Walwyn

**ACTION** OF TRESPASS for taking away four loads of wheat, four loads of rye, four loads of barley, four loads of beans, and four loads of pease. The defendant as to part pleaded *not guilty*; and as to the other part *justified*. For that the plaintiff is rector of the rectory impropriate of *Bradwardyne* in the county of *Hereford*, and so bound to repair the chancel; and that the chancel being out of repair, the *Bishop of Hereford*, after monition to \*the plaintiff\* [ 259 ] to repair the same, had granted a *sequestration* of the tithes, &c. of the rectory; and that the defendants, being churchwardens, had taken them into their hands, and so justified by virtue of the *sequestration*. To which the plaintiff demurred.

A justification in trespass, that the plaintiff was the rector of such a church, and that the goods were taken under a *sequestration* of the profits of the rectory, for the reparation of the chancel, must aver, that no more was taken than was necessary to the expence of reparation. But the profits of a lay-impropriation cannot be sequestered for the repair of the chancel.

**BARRELL, Serjeant.** I do not deny but that the rector of a rectory impropriate may perhaps be bound of common right to repair the chancel. But since the statutes of 31. *Hen. 8. c. 13.* and 32. *Hen. 8. c. 7.* have converted the tithes of such rectories into lay-fees, they have consequently exempted them from the jurisdiction of the ordinary. A doubt was conceived upon the statute of 31. *Hen. 8. c. 13.* whereby pensions, proxies and synodals are saved, what remedy lay for the recovery of them; and it was therefore provided by the statute 32. *Hen. 8. c. 7.* that the church should be sequestered. The possessions of ecclesiastical persons were subjected to the jurisdiction of THE ORDINARY, and might be sequestered in many cases by process out of the bishops courts: but whenever the possessions of laymen were charged with any ecclesiastical payment or spiritual charge, the ordinary could not take the land into his hands, nor meddle with the possession thereof in any sort; but the constant usage was to compel the persons by ecclesiastical censures. In the year 1570, there was application made to the queen to provide a remedy for the reparation of the chancels of such churches whereof the parsonages were impropriated. Moreover, he said, a sequestration does not bind the interest, nor put the rector out of possession; the not submitting to it is only matter of contempt; and it can no more be pleaded in bar to an action of trespass, than a sequestration out of chancery.

S. C. 1. Mod. 254.  
S. C. 3. Keb. 829.  
S. C. 2. Vent. 35.  
S. C. 1. Freeman. 230.  
Ante, 216. 229.  
2. Mod. 77.  
1. Vent. 5.  
Hard. 188.  
8. Mod. 338.  
10. Mod. 12.  
1. Ld. Ray. 59.  
1. Vern. 160.  
247. 421.  
1. Peer. Wms. 307. 535.  
2. Peer. Wms. 261. (621).  
3. Peer. Wms. 240. 379.  
See 2. Danv. 620, 621.

**ATKYNs, Justice.** I hope not to see it drawn in question, Whether a *sequestration* out of chancery may be pleaded in bar to an action of trespass at the common-law, or no? but if it were pleaded, I think we need not scruple to allow such a plea, by reason the court of chancery at *Westminster* prescribes to grant such a process; which is a court of such antiquity, that we ought to take notice of their customs.

4. Com. Dig. "Prohibition" (G 21). 2. Mod. 258. 2. Chan. Ca. 44. 1. Peer. Wms. (621). Vern. 421.

**BALDWIN, Serjeant, contra,** cited *Fitzherbert's Natura Brevium* (a); the *Register of Original Writs* (b); the statute of Cir-

(a) F. N. B. 50. (b) Reg. 44. b. 48, 2.

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*cumspeciè Agatis (a) ; Diathan's Commentary upon the Legatine Constitutions of Othobone, title " Ne prælati fructus ecclesiarum " \* vacantium perciperent ;* LINDEWOOD, *de ædificand. ecclesiis (b)*, where it is said, The reparation of the chancel is *onus reale, impositum rebus, non personis*; and *Cawdrie's Case (c)*: he also cited the statute of 25. Hen. 8. c. 19. *Sir John Davies's Reports* 70. *Vaughan*, 327. *Reg. Jud.* 22. 26. the Year Book 13. Hen. 4. pl. 17. 21. Hen. 6. pl. 16. b.; and the statute 28. Hen. 8. c. 9.

a. Danv. 517.  
pl. 5, 6.

Co. Lit. 159. b.

It is objected, That these tithes are become a lay-fee. To which I answer, That by the statute of 32. Hen. 8. c. 7. there is a remedy given for them in the spiritual court. It is enacted indeed, that fines and recoveries may be suffered of them, as of lands and tenements, but they are not made lay-fees to other purposes. No statute exempts them from the jurisdiction of the ordinary, nor discharges the *onus reale*. The saving in the statute of 31. Hen. 8. c. 13. preserves the power of sequestration, as well as other particulars there instanced; for "all rights of any person or persons, their heirs and successors, is saved, &c." The saving is large. The parishioners have a right in the chancel, and to have it kept in repair; for the communion-table is to stand there, though they have not *jus sepulturæ* there. The practice is with us. And this is the first instance of disobedience to such a sequestration. Besides, there are many impropriations in the hands of deans and chapters, and bodies politic, which cannot be excommunicated: What process will you grant against them but sequestration? I do not mean appropriations; to wit, such rectories as were appropriated to them before the dissolution of monasteries, and have continued so to this day; for there is no question but the ordinary may sequester them; but I mean such impropriations as they have purchased of the king and his patentees since the dissolution.

NORTH, *Chief Justice*. The bishop is in the nature of an ecclesiastical sheriff. If an action of debt were brought against a clerk, and the sheriff had returned upon a *fieri facias*, that the defendant was *clericus beneficiatus non habens laicum sedum*, there issued a *fieri facias* to the bishop, upon which he used to sequester (as they call it) the ecclesiastical possessions of the defendant: but that is not properly a sequestration; for the ordinary must not return *sequestrari feci*; he must return *fieri feci* or *nulla lona*, in like manner as a sheriff of a county must do: this I have known in experience, that a bishop has been ordered in such a case to amend his return. The reason of this process was, because the possessions of ecclesiastical persons were so distinct from temporal possessions, that they could not be subject to the ordinary process of the temporal law, no more than possessions of laymen could be subject to their jurisdiction. And therefore

\* [ 261 ]

(a) 31. Edw. 1. c.

(b) Page 156.

(c) 5. Co. 1. 2. Ander. 122. Epiph. 59.

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rectories impropriate being now incorporated into the common law, and converted into lay fees, it should seem to me, that they are thereby exempted from the jurisdiction of the ordinary: and this I take to be within the reason of *Jeffries's Case* (a), where temporal persons that are liable to contribute towards the repairs of the church out of their temporal possessions, are said to be compellable thereunto by ecclesiastical censures. It has been said, that the parishioners have a right in the chancel; but I question that: it is called *cancellum, a cancellis*, because the parishioners are barred from thence: it is the right of the parson.

WALWYN  
against  
AWBERRY  
AND OTHERS.

WYNDHAM, *Justice*, thought, that by the saving in the statute of 31. Hen. 8. c. 13. the jurisdiction of the ordinary was preserved.

ATKINS, *Justice*. The parson was chargeable with the reparation of the chancel in respect of the profits which he received: they were the proper debtors. Now I think it may be held, that the impropriation affects only the surplusage of the profits over and above all charges and duties issuing out of the parsonage, and wherewith it was originally charged: the reparation of the chancel is a right arising from the first donation; which shall not be taken away but by express words.—SCROGGS *accordant*.

NORTH, *Chief Justice*. The defendant's plea is naught; for the cause of their justification is, that what they did was in executing a sequestration, whereby they were authorised to take into their hands the profits of the rectory for the reparation of the chancel: now they ought to aver, that they did not take into their hands more than was sufficient for the reparation thereof.—If the law come to be taken as my brothers are of opinion, it will make a great step to the giving ordinaries power to encrease vicarages; for the parishioners have a right to a maintenance for one to preach to them.—*Adjournatur* (b).

(a) 5. Co. 66. Cro. Eliz. 659. ARON's Ent. 441.

(b) The Court gave judgment upon the informality of the plea; but it is said, S. C. Ventris, 35. that the Court inclined, and S. C. 2. Mod. 257. that all the justices, except ATKINS, were

of opinion, that as impropriations are now lay fees, they cannot be sequestered for the reparation of the chancel.—*See* vide 3. Kebble, 829. Gibson, 199. contra. See also 1. Burn's Eccl. Law, 324.

• [ 262 ]

\* Edwards *against* Weeks.

Case 14.

ACTION UPON THE CASE. The plaintiff declares, That the defendant, in consideration that the plaintiff would deliver to him such a horse, promised to deliver to the plaintiff in lieu thereof another horse, or five pounds upon request: and avers, that the plaintiff had delivered to the defendant the said horse, and had received

A parol agreement may be discharged by parol before the cause of action accrues.

S. C. 2. Mod. 259. Ante, 206. 1. Sid. 177. 293. 2. Leon. 214. 1. Roll. Abr. 450. 2. Roll. Abr. 408. Cro. Jac. (620). 483. 2. Mod. 44. 4. Mod. 250. 3. Lev. 244. 4. Bac. Abr. 265. 1. Com. Dig. 151. 1. Term Rep. 133.

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against  
WEEKS.

quested him, &c. The defendant pleads, that the plaintiff, before the action brought, discharged him of that promise, but says not how: to which the plaintiff demurred.

STRODE, *Serjeant*. If he had pleaded a discharge before the request made, the plea had been good without shewing how he discharged him: but after the request once made, a verbal discharge is not sufficient; and he cited the case of *Langden v. Stokes*, *Cro. Car.* 384. and the Year Book of 22. *Edw.* 4. 40. b.—

THE COURT agreed and gave judgment for the plaintiff, *nisi causa, &c.*

Case 15.

Barker against Keate.

If a conveyance be made, though without any pecuniary consideration, by the words "demise" and "grant," with the reservation of a pepper-corn, for the purpose of receiving a release of the inheritance, the consideration of a pepper-corn is good to raise a use in the grantee, and make the lands pass by way of bargain and sale.

**EJECTMENT** of land in *Castle Acre* in the county of *Norfolk*. The defendant pleaded *not guilty*; and the issue was found as to part; and for the residue there was a special verdict:

That *Edmund Hudson* was seised to him and the heirs males of his body, the remainder to *William Hudson* his brother, and the heirs males of his body: that *Edmund Hudson* by indenture betwixt himself and *Thomas Peeps* demised to *Thomas Peeps* from the feast of *St. Michael* then last past for six months, rendering a pepper-corn rent; and that afterwards by another indenture between himself on the one part, and *Thomas Peeps* and *Edward Bromley* on the other part, reciting the said lease, he bargained and sold the reversion to *Thomas Peeps*, his heirs and assigns, to the intent to make him tenant to the *præcipe* in order to the suffering of a common recovery, in which *Edmund Bromley* was to be the recoveror, and himself the said *Edward Hudson* the vouchee; and that this recovery was to be to the use of *Edmund Hudson* and his heirs, &c. And the jury made a special conclusion, *viz.* That if the Court should adjudge that \* in this recovery there were a good tenant to the *præcipe*, then they found for the plaintiff; otherwise for the defendant.

\* [ 263 ]  
S. C. 2. Mod. 249.  
S. C. 1. Freem. 249.  
Ante, 175.  
2. Roll. Abr. 781.  
Cro. Car. 110.  
Cro. Jac. 604.  
Carter, 66.  
1. Co. 154.  
Hob. 151.  
Fitzg. 301.  
10. Mod. 421.  
436. 533. 12. Mod. 162. Sanders on Uses and Trusts, 443. 451. 469.

WALLER, *Serjeant*, argued, That there was no good tenant to the *præcipe*; for that *Thomas Peeps* never was in possession, by virtue of the lease, for six months. No entry is found, nor no consideration to raise an use. All the consideration mentioned, is the reservation of a pepper-corn; which is not sufficient; for it is to be paid out of the profits of the land. He compared it to *Colyer's Case* (a), where a sum in grois appointed to be paid by the devisee, gave him an estate in fee simple; but a sum to be paid out of the profits of the land, not. He cited *Lord Pagett's Case* (b), and the case of the *Abbot of Bury v. Bokenham* (c). Besides,

(a) 6. Co. 16. Cro. Eliz. 378. 1. Leon. 194. 1. Andr. 259. 1. Ca.  
(b) 2. Roll. Abr. 784. Moor, 193. 154. Jenk. 247.  
(c) Dyer, page 8. pl. 31.

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the consideration, in our case, is a thing of no value, being but a single pepper-corn. If an infant make a lease for years, rendering rent, the lease is but *voidable*; but if an infant make a lease for years, rendering a rose, or a pepper-corn, or any such-like trifle, the lease is *void*: and he cited *Fitzherbert tit. "Entry con-geable"* 26.

BARKER  
against  
KEATE.  
Hob. 151.  
1. Co. 154.  
3. Mod. 310.  
3. Burr. 1794.

NORTH, *Chief Justice*. When a tenant for life, or years, assigns his estate, there needs no consideration. In such case the tenure and attendance, and the being subject to the ancient forfeiture, and the payment of rent, if there were any, is sufficient to vest the use in the assignee: but otherwise in case of a fee-simple. When a man is seised in fee, and makes a lease for years, unless he give possession, and the lessee enter, he must raise an use. But in our case the reservation seems not sufficient to raise an use; for an use must be raised, and the land united to it, before a rent can result out of it.

2. Rol. 781.  
Pl. 7.

WYNDHAM, *Justice*. It being in the case of a common recovery, we must support it, if it be possible. In the case of *Sutton's Hospital*, 10. Co. 34. a. it is said, that the reservation of twelve-pence rent, was a sufficient consideration to vest an use in the hospital; and a rent of twelve-pence is as inconsiderable a matter in consideration of a great estate, as a pepper-corn in our case. The case in *Dyer*, of the *Abbot of Bury v. Bokenham*, that has been cited, is made *a quære* in the book. I think the reservation of a rent would have changed an use at the common law, and will raise an use at this day. If a feoffee to an use had made a feoffment in fee rendering rent, the feoffment (I conceive) would have been to the use of the second feoffee, and the first use destroyed.

The other two Justices delivered no opinion.

\* At another day, the cause being moved again, NORTH, *Chief Justice*, said, he had looked upon the precedent quoted out of the case of *Sutton's Hospital*, and that there the reservation of a rent was mentioned in the deed as a consideration to raise an use, which, he said, would perchance make a difference betwixt that case and this. But THE COURT would advise further (a).

(a) In the Michaelmas Term following, the unanimous opinion of the whole Court was, that the word "grant" was sufficient to pass the land by way of use; that the reservation of a pepper-corn was a sufficient consideration to raise an use to support a common recovery; and that the lease being within the 27. Hen. 8. c. 10. there was no

necessity for an actual entry to make the lessee capable of a release; for being in possession by the statute, it shall be construed an actual possession, and so a good tenant to the *præcipe*: and judgment was given accordingly. S. C. 2. Mod. 253. See also 3. Mod. 310. Sanders on Uses and Trusts, 443. 451. 469. and the 14. Geo. 2. c. 20.

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Case 16.

Bassett against Bassett.

A condition "if A. within six months after the death of B. shall assure an annuity of twenty pounds to C. as the counsel of C. shall advise, at the proper costs of C. if he shall require the same, or if A. shall not assure the said annuity, that then if he pay to C. the sum of three hundred pounds the obligation shall be void," is not broken unless C. within six months after the death of B. tender an assurance of the annuity to A.; for as the assurance was to be at his costs, it is incumbent on him to request A. to grant the annuity.

\* [ 265 ]

S. C. 1. Freem. 228.  
S. C. 2. Mod. 200.  
2. Danv. 78. 84.  
Moor, 357. 241.  
Cro. Eliz. 398.  
539. 864.  
1. Ro. Ab. 447.  
Co. Lit. 225.  
Cro. Eliz. 398.  
864.  
3. Lev. 177.  
5. Co. 22.  
2. Mod. 200.  
304.  
2. Ld. Ray.  
1095. 1140.  
1459.  
3. B. & C. Abr.  
7-8.

AN ACTION OF DEBT upon an obligation of six hundred pounds penalty. The condition was, "That if the above-bounded John Bassett, his heirs or assigns, shall within six months after the death of Mary Bassett, his mother, settle upon and assure unto Hopton Bassett, as the counsel of the said Hopton Bassett, learned in the law, shall advise, at the costs and charges of the said Hopton Bassett, an annuity or rent-charge of twenty pounds *per annum*, payable half-yearly by equal portions, from the death of the said Mary, during Hopton Bassett's life, if he the said Hopton Bassett require the same, at the dwelling-house of the said John Bassett; or if he shall not grant the same, if then the said John Bassett shall pay unto Hopton Bassett within the time aforementioned three hundred pounds, then the obligation to be void."—The defendant pleaded, that the plaintiff (*to wit*, the said Hopton Bassett) had not tendered any grant of an annuity, within the time of six months after the death of his mother, according to, &c. The plaintiff replied. The defendant rejoined. But the counsel on both sides and THE COURT agreed, that the whole question arose upon the plea in bar.

STRODE, *for the defendant*. The plaintiff ought to have tendered us a grant of annuity, to be sealed within six months, &c. and having neglected that, he has dispensed with the whole condition. For, FIRST, This is not a disjunctive condition; but the payment of three hundred pounds is as a penalty imposed upon him, if he refuse to make such a grant. "And if he shall not, &c." instead of the word "not," put the words "refuse to, &c." and the case will be out of doubt. Besides, the annuity to be granted is but twenty pounds a-year for a life, and three hundred pounds in money is more than the value of it; so that it cannot be intended a sum to be paid in lieu or recompence of it, but must be taken for a penalty. But suppose it to be a disjunctive condition (*a*), then we ought to have an election whether we would do; but as this case is, the plaintiff by his negligence has deprived us of our election: for authorities he cited *Gerningham v. Ewer*, Cro. Eliz. 396. and 539. the Year Book 4. Hen. 7. fol. 4. *Laughter's Case*, 5. Co. 21. b. and *Warner v. Whyte*, resolved the day before in the king's bench. There is a rule laid down in *Morecomb's Case*, Moor, 645. which makes against me; but the resolution of that case is law, and there needed no such rule: that case goes upon the reason of *Lamb's Case*, 5. Co. When a man is obliged to pay such a sum as J. S. shall assess, J. S. being a mere stranger, the obligor takes upon him that J. S. shall assess a sum in certain; and he must procure him to do it, or he forfeits his obligation. But in our case nothing is to be done but by the obligee himself.

PEMBERTON *contra*. He argued that the obligor's election is not taken away; for though no deed were tendered him, he might

Trinity Term, 29. Car. 2. In C. B.

have got one made, and the tender of that would have discharged the condition of his bond. Indeed this will put him to charge, but he may have an action of debt for what he lays out: he cited the cases cited by WALMESLEY in *Moor*, 645. betwixt *Milles v. Wood*; and *Gower's Case*, 38 & 39. *Eliz. &c.*

BASSETT  
against  
BASSETT.

NORTH, *Chief Justice*. The case of *Warner v. White* adjudged yesterday in the court of king's bench, is according to law. The condition there was, that *J. S.* should pay such a sum upon the 25th of *December*, or should appear in *Hilary Term* after, in the court of king's bench. *J. S.* died after the twenty-fifth day of *December* and before *Hilary Term*, and had paid nothing upon the twenty-fifth of *December*: in that case the condition was not broken by the non-payment, and the other part became impossible by the act of God: but I think, that if the first part of a condition be rendered impossible by the act of God, that the obligor is bound to perform the other part. But in the case at the bar the obligor's election is taken away by the act of the obligee himself; and I see no difference betwixt this case and that of *Gerningham v. Ewer* in *Cro. Eliz.* 396. If the condition of an obligation be single, to make such assurance as shall be advised by the counsel of the obligee; there "*consilium non dedit advisamentum*" is a good plea; and the obligor is not bound to \* make an assurance of his own head; no more shall he be bound to do it when the condition is in the disjunctive, to save his bond. In both cases the condition refers to the manner of the assurance; and it must be made in such manner as the words of the condition import. So he said he was of opinion against the plaintiff.

\* [ 266 ]

WYNDHAM, *Justice*. Where the condition of an obligation is in the disjunctive, the obligor must have his election: but in this case there is no such thing as a disjunctive, till such time as there be a request made to seal a deed of annuity; and then the obligor will have an election, either to execute the assurance, or to pay the three hundred pounds; but no such request being made, it should seem that the obligor must pay the three hundred pounds at his peril.

ATKINS, *Justice*, agreed with THE CHIEF JUSTICE, and so did SCROGGS, *Justice*.—Wherefore judgment was ordered to be entered against the plaintiff, *nisi causa, &c.* within a week.

Anonymous.

Case 17.

QUERE IMPEDIT. The plaintiff declared upon a grant of the advowson to his ancestor; and in his declaration says, *hinc in curia prolata (a)*, but indeed had not the deed to shew. In pleading a grant of an advowson, with a profert of the deed, the Court on oyer will not admit a copy, although the original is in the hands of the other party. 10. Co. 92. 1. Bid 386. 1. Saund. 9. 8. Mod. 75. 322. 9. Mod. 66. 10. Mod. 8. 42. 74. 108. 126. 292. 507. 515. 12. Mod. 24. 394. 414. 494. 500. 579. 2. Vern. 471. 591. 603. Prec. in Chan. 116. Abr. Eq. 228. 1. Ld. Raym. 153. 746. 2. Ld. Raym. 763. 967. 1126. 1536. 1. Stra. 401. 526. 2. Stra. 1186. 1198. 1247. 1. Wils. 16. 1 and see the case of *Matison v. Atkinson*, and *Fotty v. Nesbit*, 3. Term Rep. 153. *notis*; and *Atkinson v. Leonard*, 3. Brown's Caf. Chan. 223. 1. Crompt. Prac. 137. Dougl. 476.

(a) See the Statutes 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

Trinity Term, 29. Car. 2. In C. B.

**ANONYMOUS.** **BALDWIN**, *Serjeant*, brought an affidavit into court, that the defendant had gotten the deed into his hands, and prayed that the plaintiff may take advantage of a copy thereof which appeared in an inquisition found in the reign of *Edward the Sixth*.

**THE COURT.** When an action of debt is brought upon a bond to perform covenants in a deed, and the defendant cannot plead "covenants performed" without the deed, because the plaintiff has the original deed, and perhaps the defendant took not a counterpart of it, we use to grant imparlances till the plaintiff bring in the deed. And upon evidence if it be proved that the other party has the deed, we admit copies to be given in evidence. But where the law requires that the deed be procured, you have your remedy for the deed at law. We cannot alter the law, nor ought to grant an imparlance.

\* [ 267 ]

Case 19.

\* *Strode against Perryer.*

*A* having a son and a grandson, both of the name of *Robert*, devises land to his son *Robert*, and his heirs.—*Robert* the son dies in the life-time of the testator.—Afterwards the testator, with a view to re-publish his will, made a *parol declaration* of his intention that *Robert* his GRANDSON should take the land by the said will.—This is not a sufficient devise to convey the lands to the grandson by force of the will.

*S. C. Freem.*

292. 477.

*S. C. 2. Mod. 313. S. C. 1. Eq. Ab. 407. S. C. 2. Lev. 143. S. C. Pollex. 546. S. C. Ray. 408. S. C. 1. Vent. 341. S. C. 2. Jones, 135. S. C. 3. Keb. 84c. S. C. 2. Show. 61. S. C. 2. Danv. 534. Plowd. 345. Moor, 353. 476. Cro. Eliz. 421. Dyer, 143. 5. Co. 61. Lutw. 735. 2. Leon. 70. Salk. 231. 3. Mod. 9. 68. 159. 10. Mod. 96. 371. 467. 520. Fitzg. 225. 246. 314. 1. Vern. 30. 2. Vern. 105. 573. 624. Gilb. Rep. 4. 11. Prec. Chan. 441. Abr. Eq. 406. Comyns, 381. 2. Peer. Wms. 136. 182. 3. Peer. Wms. 51. 354. Ld. Ray. 438. 1282. 1324. 2. Vezey, 56. 3. Com. Dig. "Devise" (E 5.). (N 25.). Cowp. 87. 840 812. 1. Bio. Caf. Chan. 296. Dougl. 31. Pow. on Dev. 676. 678. Gilb. on Dev. 90.*

**EJECTMENT.** A man has a son called *Robert*. *Robert* has likewise a son called *Robert*. The grandfather deviseth the land in question to his son *Robert*, and his heirs. *Robert* the devisee dies in the devisor's life-time. Afterwards the devisor makes a new publication of the same will; and declares it to be his intention, that *Robert* the grandchild should take the land in question *per eandem voluntatem*, instead of his father, and died. And all this was found by special verdict, upon a trial betwixt *Robert* the grandchild, and a daughter of the elder brother of *Robert* the first devisee.

**PEMBERTON.** The land doth not pass by this will. The devise to *Robert* became void by his death, and cannot be made good by a republication. A publication cannot alter the words of a will, so as to put a new sense upon them. Land must pass by will in writing (*a*). *Robert* the grandson is not within this will in writing. The grandfather's intention is not considerable in the case.

**SKIPWITH contra.** I agree the case of *Brett v. Rigden* (*b*), to be law: but there are two great diversities between this case and that. **FIRST**, There was no new publication. **SECONDLY**, In this case *Robert* the father and *Robert* the son are cognominous: he cited *Trevilian's Case*, *Dyer* 142, 143. *Fuller v. Fuller*, *Cro. Eliz.* 422. and *Moor* 353. *Cro. Eliz.* 493.

(a) See 29. Car. 2. c. 3. s. 5.

(b) Plowd. Com. 340.

Trinity Term, 29. Car. 2. In C. B.

NORTH, *Chief Justice*. Without question *Robert* the grandchild shall take by this will. If he never had had a son called *Robert*, or if *Robert* the son had been dead at the time of making the will, the grandchild would then, without dispute, have taken by these words. Now a new publication is equivalent to a new writing. The grandchild is not directly within the words of the will; but they are applicable to him. He is *a son*, though he be not begotten by the body of the devisor himself. He is son with a distinction. Our Saviour is called the son of *David*, though there were twenty-eight generations betwixt *David* and him. A republication may impose another sense upon these words, different from what they had when they were first written; as, if a man devise all his \*lands in *Dale*, and have but two acres in *Dale*, the words now extend to more than those two acres; and if he purchase more, and die without any new publication, the new purchased land will not pass; but if there were a new publication after the purchase, they would pass well enough. If a man have issue two sons called *Thomas*; and he makes a devise to his son *Thomas*, this may be ascertained by an averment. Now suppose that *Thomas* the devisee dies, living the father, and afterwards the father publisheth his will anew, and says that he did intend that his son *Thomas*, now dead, should have had his land but that now his will and intent is, that *Thomas* his younger son, now living, shall take his land by the same will; in this case, to be sure the second son *Thomas* shall take by the devise. Here the import of the words is clearly altered by the republication.

STRODE  
against  
PICKYER.

\* [ 268 ]

ATKINS, *Justice*. The words of this will would not of themselves be sufficient to carry the land to the grandchild, nor would the intention of the devisor do it without them; but both together do the business. *Quæ non profunt singula, juncta juvant.*

WYNDHAM and SCROGGS, *Justices*, differed in opinion, and the cause was adjourned to be argued the next Term (a).

(a) Judgment was given in the common pleas in favour of the grandson against the heir at law; the three Justices, against SCROGGS (*sed vide* 3. Keb. 847.), being of opinion, that the republication made it a new will, and that the grandson took by the name of son. S. C. 2. Mod. 314. S. C. 1. Freem. 293. S. C. Ray. 408. But a writ of error was brought on this judgment to the king's bench; and in Hilary Term 31. Car. 2. after several arguments, SCROGGS, who was now Chief Justice of this court, JONES and RAYMOND, *contra* DOLLEN, were

of opinion, that the grandson could not take; for that neither the republication nor *parol declaration* could operate as a devise to him; and the judgment was reversed. S. C. 2. Show. 66. S. C. 1. Vent. 342. S. C. 2. Mod. 314. so that upon this matter, says Pollexfen, 552. there are four Judges against three, and the judgment of the three stands; but S. C. 2. Lev. 244. *quæret*, if the judgment was reversed; and S. C. 1. Freem. 478. says, it was adjourned. But see S. C. 2. Jones, 135. S. C. 1. Eq. Abr. 407.

Anonymous.

Trinity Term, 29. Car. 2. In C. B.

Cafe 20.

Anonymous.

A person suing in *forma pauperis* cannot have a new trial; or remove his cause.

Ante, 84.

8. Mod. 344.

1. Stra. 420.

**NORTH, Chief Justice.** A man admitted in *forma pauperis* is not to have a new trial granted him; for he has had the benefit of the king's justice once, and must acquiesce in it. We do not suffer them to remove causes out of inferior courts. They must satisfy themselves with the jurisdiction within which their action properly lieth.

2. Stra. 378, 891, 983, 1121.

Cafe 21.

Farrington against Lee.

To an action of *assumpsit* upon an account stated, the defendant may plead the statute of limitations.

\* [ 269 ]

S.C.2 Mod. 311.

Ante, 70.

Tothil, 64.

March, 105.

12. Mod. 579.

Gilb. Eq. Rep.

224.

1. Vern. 456.

2. Vern. 695.

Abr. Eq. 304.

1. Saund. 36.

2. Saund. 66.

120. 125.

1. Stra. 556.

2. Stra. 836.

1. Peetr. Wms.

742.

Gilbert's Law

of Evidence,

4th edit. 189.

**ASSUMPSIT.** The plaintiff declares upon two *indebitatus assumpsits*, and a third *assumpsit* upon an *in simul computasset*. The defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied, that himself is a merchant, and the defendant his factor; and recites a clause in the statute 21. Jac. 1. c. 16. in which actions of account between merchants and merchants, and merchants and their factors, concerning their trade and merchandise, are excepted; and avers that this money became due to the plaintiff upon an account betwixt him and the defendant concerning merchandise, &c. The defendant makes an impertinent rejoinder; to which the plaintiff demurs.

**NEWDIGATE, for the plaintiff.** This statute is in the nature of a penal law; because it retrains the liberty which the plaintiff has by the common-law to bring his action when he will; and must therefore be construed beneficially for the plaintiff: the case of *Fincke v. Lamb* is to the purpose. Also this exception of accounts between merchants and their factors, must be liberally expounded for their benefit; because the law-makers, in making such an exception, had an eye to the encouragement of trade and commerce. The words of the exception are, "other than such accounts as concern the trade of merchandise, &c." Now this action of ours is not indeed an action of account; but it is an action grounded upon an account. And the plaintiff being at liberty to bring either the one or the other upon the same cause of action, and one of the actions being excepted expressly out of the limitation of the statute, the other by equity is excepted also. He cited *Hill. 17. Car. 1.* in *March's Reports*, 151. and *Sundys v. Bloodwell*, *Jones* 401. and prayed judgment for the plaintiff.

**SERJEANT BALDWIN contra.** He said, it did not appear in the declaration that this action was betwixt a merchant and his factor; so that then the plea in bar is *prima facie* good. And when he comes and sets it forth in his replication, he is too late in it: and the replication is not pursuant to his declaration.

But ALL THE COURT was against him in this.

Trinity Term, 29. Car. 2. In C. B.

THE SERJEANT then said, the statute excepted actions of *account* only; and not actions upon an *indebitatus assumpsit*. FARRINGTON  
against  
LEE.

THE COURT. Whereas it has been said by SERJEANT NEWDIGATE, that the plaintiff here has an election to bring an action of *account*, or an *indebitatus assumpsit*, that is false; for till the account be stated betwixt them, an action of *account* lies, and not an action upon the case.—When the account is once stated, then an action upon the case lies, and not an action \* of *account*.—And by NORTH, *Chief Justice*. If upon an *indebitatus assumpsit* matters are offered in evidence that lie in *account*, I do not allow them to be given in evidence. \* [ 270 ] .

NORTH, *Chief Justice*, WYNDHAM, and SCROGGS, *Justices*. The exception of the statute goes only to actions of *account*, and not to other actions. And we take a diversity betwixt an *account current*, and an *account stated*. After the account stated, the certainty of the debt appears, and all the intricacy of *account* is out of doors: and the action must be brought within six years after the account stated.—But by NORTH, If after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account between the same parties, it is now slipped out of the statute again.

SCROGGS, *Justice*. The statute makes a difference betwixt actions upon *account*, and actions upon the case. The words would else have been, “all actions of *account*, and upon the case, “other than such actions as concern the trade of merchandise.” But it is otherwise penned; “other than such actions as concern, “&c.” and as this case is, there is no action betwixt the parties; the account is determined, and the plaintiff put to his action upon an *in simul computasset*: which is not within the benefit of the exception.

ATKINS, *Justice*. I think the makers of this statute had a greater regard to the persons of merchants, than the causes of action between them. And the reason was, because they are often out of the realm, and cannot always prosecute their actions in due time. The statute makes no difference betwixt an *account current*, and an *account stated*. I think, also, that no other sort of tradesmen but merchants are within the benefit of this exception; and that it does not extend to shop-keepers, they not being within the same mischief.—*Adjournatur* (a).

(a) It appears by S. C. 2. Mod. 312. judgment was given for the defendant that in Trinity Term 30. Car. 2.

Memorandum.

IN Trinity Term 30. Car. 2. SIR WILLIAM SCROGGS, *Justice* of the Common Pleas was made *Chief Justice* of the King's Bench, in the place of SIR RICHARD RAINSFORD.—VERE BERTIE, *Baron* of the Exchequer, was made a *Justice* of the Common Pleas; and FRANCIS BRAMPSTON, *Serjeant*, a *Baron* of the Exchequer. Ray. 244.

MICHAELMAS

# MICHAELMAS TERM,

The Twenty-Second of Charles the Second,

I N

The King's Bench.

Monday, October 24, 1670:

*Sir John Kelynge, Knt. Chief Justice.*

*Sir Thomas Twifden, Knt.*

*Sir Richard Rainsford, Knt.*

*Sir William Moreton, Knt.*

} *Justices.*

*Sir Heneage Finch, Knt. Attorney General.*

*Sir Edward Turner, Knt. Solicitor General.*

\* [ 271 ]

Cafe 22.

\* Horn against Chandler.

Trinity Term, 22. Car. 2. Roll 1559.

An infant unmarried, and above the age of fourteen years, may bind himself apprentice to a freeman of London; and by the custom of that city, the master shall have the same remedies against him on the covenants of the indenture as if he had been of full age.—The custom is sufficiently alledged by the word "*tale remedium*" to support COVENANT.—S. C. 2. Keb. 687. 710. S. C. 2. Danv. 460. 21. Edw. 4. pl. 6. Moor, 136. 2. Bull. 192. 2. Roll. Rep. 305. Palm. 362. Holt. 64. Winch. 63. Yelv. 94. Allen, 23. Hob. 214. Cro. Jac. 619. Cro. Car. 179. 2. Saund. 169. 6. Mod. 69. 8. Mod. 191. 9. Mod. 191. 10. Mod. 144. 149. 11. Mod. 49. 12. Mod. 419. 2. Vern. 492. 2. Peer. Wms. 288.

COVENANT upon an indenture of an apprentice, wherein the defendant bound himself to serve the plaintiff for seven years. The plaintiff sets forth the custom of London, that any person above fourteen years of age and under twenty-one, and unmarried, may bind himself apprentice, &c. according to the custom, and that the master thereupon shall have *tale remedium* against him as if he was twenty-one years of age; and alledges, that the defendant did go away from his service, *per quod* he lost his service for the said term, which term is not yet expired. The defendant pleads a frivolous plea; to which the plaintiff demurs.

OFFLAT.

Michaelmas Term, 22. Car. 2. In B. R.

**OFFLEY.** Though such a covenant shall not bind an infant either by common law, or by 5. *Eliz. c. 1.* yet by this custom it shall. In *Easter Term*, 21. *Jac. 1.* in the king's bench, in the case of *Cole v. Helme*, there was such an action against an apprentice, to which the defendant pleaded "non-age;" and the plaintiff replied "the custom of *London*," and that the indenture of apprenticeship was inrolled as it ought to be, &c. and this was certified by **SERJEANT FINCH**, the Recorder, to be the custom (a), and thereupon judgment was against the defendant: it is a manuscript. HORN  
against  
CHANCELLER.  
(a) Dougl. 378.  
331.

**JONES.** The custom ought to have been alledged, that he should have an action of covenant against him, which is not done here; and customs shall be taken strictly, not by implication: moreover the plaintiff declares for a loss not yet sustained, the term not being ended.

**THE COURT.** The custom is sufficiently alledged to give and make good an action of covenant; the words "*tale remedium*" imply it: those words are applicable to all things relating to this matter, viz. that the master may correct him, may go to a justice of peace, and also may have an action of covenant against him, as against a man of full age; and though by common law or the statute his covenant shall not bind him, yet by the custom it shall.

But **TWISDEN**, Justice, desired to see *Offley's* Report of the case of *Cole v. Holme*. As to the declaring for the loss of the term, part whereof is unexpired; though it has been adjudged to be naught after a verdict, yet in this case, which is upon demurrer, it may be helped; for the plaintiff may take \* damages for the departure only, not the loss of service during the term; and then it will be well enough.—Judgment nisi, &c. \* [ 272 ]

Jones against Powel.

Case 23.

**WORDS** spoken of an attorney, "Thou canst not read a declaration," *per quod*, &c.—**THE COURT.** The words are actionable, though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes, &c.—Judgment was given for the plaintiff. To say of AN  
ATTORNEY,  
"He cannot  
read a decla-  
ration," is  
actionable, with-  
out special da-  
mage.

S. C. Ray. 196. S. C. 1. Vent. 98. S. C. 1. Lev. 297. S. C. 2. Keb. 710. Moor, 409. Godb. 441. 1. Sid. 327. Cro. Eliz. 342. 1. Roll. Abr. 52. Cro. Car. 515. Hub. 9. Latch. 21. Brownl. 16. 1. Vent. 117. Ley, 70. Strange, 1138. 3. Wilson, 59. 4. Term Rep. 366.

Furlong against Bray.

Case 24.

*Hilary Term*, 20. & 21. Car. 2. Roll 1578.

**THE** defendant in an action of false imprisonment justified the taking and imprisoning the plaintiff by virtue of an order of chancery, that he should be committed to **THE FLEET**; and the chancery.—S. C. 2. Saund. 182. S. C. 2. Keb. 711. Ante, 170. 1. Vern. 131. 1. Stra. 509. 2. Peer. Wms. 675. 701. 2. Peer. Wms. 55. 261. 483.

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Michaelmas Term, 22. Car. 2. In B. R.

FURLONG  
against  
BRAY.

plea was judged naught, because *an order* is not sufficient. It ought to have been *an attachment* he should have pleaded, *quodam breve de attachiamento*, &c.

Case 25.

Osborne against Walleeden.

Easter Term, 22. Car. 2. Roll 162.

If a devise be made of a *rent-charge* to a woman "for life, and if she marry, his executor shall pay her 100l. and the rent-charge shall cease, and return to the executor;" the rent-charge shall not cease on her marriage until the 100l. be paid.

**REPLEVIN.** The defendant avows in right of his wife for a *rent-charge*, devised to her for life by her former husband. But in the will there was this clause, *viz.* "If she shall marry, &c. he (the executor) shall pay her one hundred pounds, and the rent shall cease and return to the executor;" she doth marry, and the executor does not pay the hundred pounds.

The question was, Whether the rent should cease before the hundred pounds be paid?

\* **JONES, for the plaintiff.** The rent ceases immediately upon her marriage, and he shall have remedy for the one hundred pounds in the spiritual court. If the words had been, "he shall pay her a hundred pounds, and from that time the rent shall cease," it had been otherwise; if she had died presently after the marriage, her executor should have had the hundred pounds.

\* [ 273 ]

S. C. 2. Saund. 197.  
S. C. 2. Keb. 712.  
S. C. 1. Danv. 651.  
1. Roll. Abr. 311. 347.  
Cro. Jac. 442.  
1. Vern. 396.  
2. Saund. 111.  
8. Mod. 26.  
10. Mod. 154.  
180. 222. 371.  
1. Stra. 229.  
Dougl. 63. 689.  
1. Term Rep. 389.

**BREWER and SAUNDERS, for the defendant.** She had not a present interest in the hundred pounds. In this very case the common pleas delivered their opinions, that this hundred pounds ought to be paid before the rent should cease; but for imperfection in the pleading we could not have judgment there. And by *Rolle's Abridgment* she has no present interest in the hundred pounds, nor can her executors have any, and the rent shall not cease till the payment of it. For, **FIRST**, It is devised to her for *life*, not during her *widowhood*. **SECONDLY**, The rent issues out of the inheritance, and by the construction of the will it shall go to the executor; for by "cease" in the will is meant "cease as to the wife;" and the executor is in nature of *purchaser*, and ought to pay the money before he has the rent, and he ought to pay it out of his own estate if he will have the rent; for otherwise, if it be looked upon as a legacy, if he have no assets, she shall be immediately stripped of her rent, and have nothing.

**TWISDEN, Justice.** I think the devisor's meaning was to give her a present interest in the hundred pounds; and if so, the rent must cease presently upon the marriage. But since it is to be issuing out of the inheritance, it is doubtful: and since my brothers are both of opinion for the *avowant*, let him have judgment.

A husband may avow alone for a rent-charge devised to his wife.

**THEN** it was objected, That *the avowry* was ill; for it ought to have been in the wife's name as well as the husband's: and it was alledged, that *Rolle* in his *Abridgment* makes a *quære*, and seems to

1. Danv. Abr. 651. S. C. 2. Saund. 197. 1. Roll. Abr. 311. 347. 5. Mod. 73. 1. Vern. 396. 2d. Ray. 64. Dougl. 329.

be

Michaelmas Term, 22. Car. 2. In B. R.

be of opinion that the case of *Wife v. Bellent* (a), which is to the contrary, is not law.

OSBORNE  
against  
WALLKEDEN

TWISDEN, *Justice*. That was his opinion, it may be, when he was a student. You have in that work of his a common-place which you stand too much upon: I value him where he reports judgments and resolutions; but otherwise it is nothing but a collection of Year-Books, and little things noted when he made his common-place book. His private opinion must not warrant or controul us here. It has been adjudged, that the husband alone may avow in right of his wife.

(a) Cro. Jac. 442. 1. Roll. Abr. 318.

\* [ 274 ]

\* Donavan against Maschall.

Cafe 26.

Trinity Term, 22. Car. 2. Roll 834.

**D**EBT UPON A BOND; the condition whereof was, That if *J. S.* and *J. D.* arbitrators, did make an award on or before the 19th day of *February*, and if the defendant should perform it, then the obligation should be void; and then follow these words, "and if they do not make an award *before* the nineteenth day of *February*, then I impower them to choose an umpire, and by these presents bind myself to perform his award." The defendant pleads, that they did not make an award. The plaintiff replies, and sets forth an award made upon the said nineteenth day of *February* by an umpire chosen by the arbitrators, and alledges a breach thereof. The defendant demurs.

On a submission to arbitration, on condition, that if the arbitrator do not make an award on or before the 19th Feb. he may chuse an umpire; the arbitrator may chuse an umpire before that day; but an award made by the umpire on that day is void, unless it appear that the arbitrator had made no award.

SAUNDERS, *for the defendant*. FIRST, Here is no breach of the condition of the bond; for that which relates to the performing the umpire's award, it following those words, "then the obligation shall be void," is no part of the condition; and if any action is to be brought upon that part, it ought to be *covenant*. SECONDLY, The award made by the umpire is void, because made on the nineteenth day of *February*, which was within the time limited to the arbitrators for their power; and the umpire could not make an award within that time, because their power was not then determined, as was lately adjudged in the case of *Copping v. Hornar* (a).

S. C. 2. Keb. 714.  
S. C. 1. Lev. 302.  
S. C. Ray. 205.  
Ante, 15.  
1. Sid. 314.  
456.  
2. Jones, 167.  
Lutw. 541.  
1. Saund. 129.  
133.  
2. Saund. 130.  
132.  
1. Salk. 70.  
2. Mod. 169.

JONES, *for the plaintiff*. The condition is good as to this part; it is all but one condition. A man may make several defeasances or conditions to defeat the same obligation. There is a continuance of this condition: it is said, "I bind myself by these presents," which refers to the *lien* before in the obligation. I agree with the determination in the cases of *Copping v. Hornar*, and *Bernard v. King* (b), that where an umpire is at first certainly named and appointed, he cannot exercise his authority

(a) 1. Lev. 285. 1. Sid. 428. 454. Ray. 187. 2. Keb. 462. 619. 2. Saund. 132.

(b) 1. Danv. Abr. 541. p. 6. Stiles, 306.

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within the time appointed to the arbitrators, because the same authority cannot be given to and continue both in *the arbitrators* and *the umpire* at the same time. But when the umpire is named and chosen by the arbitrators, as in our case, he may make his award within the time allowed to the arbitrators; \* because there the arbitrators by their own act, *viz.* the election of the umpire, determine their authority; and the authority vests and remains in the umpire only: and so it was admitted in the case of *Bernard v. King (a)*.

TWISDEN; *Justice (assentibus RAINSFORD and MORTON)*. This is a good part of the condition. There was a condition, that "if the obligor should, &c. then the bond should be void;" and further, that "the obligor should release:" and it was adjudged here, that the last was a part of the condition. I was at the bar when the case of *Bernard v. King* was spoken to, and I know ROLLE did hold and deliver then, That if it had been alledged, that the arbitrators had wholly denied and deserted their power, it had let in the umpire, so as that he might account within the time allowed to the arbitrators; and he stood upon this then, that it was implicitly alledged, *viz. postquam denegassent, &c.* But this was a hard opinion of his, and he himself reports his own judgment otherwise (b), and it may be that he altered his opinion.

We incline that the award in the case at the bar is naught; for the authority of the arbitrators was not determined till after the nineteenth day of *February*. In the case of *Jennings v. Vandeput (c)*, CROKE, *Justice*, goes so far as to agree, that arbitrators may nominate an umpire within the time for their making their award; so that the chusing the umpire doth not extinguish their authority, and therefore the umpire could not make an award upon this nineteenth day of *February*. It is true, the arbitrators might chuse him upon that day, or before; but yet still they might have made an award, and therefore he could not.—*Adjour-natur (d)*.

See note the  
difference in  
Nelson's Lutw.  
167, &c. ib.

(a) 1. Danv. 541. Styles, 306.

(b) 1. Roll. Rep. 262.

(c) Cro. Car. 263.

(d) The Court gave judgment for the *defendant*, because it was not alledged by the plaintiff, that the arbitrators had not made an award. S. C. 2. Keb. 714; for they agreed that the addition was parcel of the condition, and that the arbitrators may chuse an umpire at any time during a continuance of this power; S. C. Ray. 206; S. P. 1. Term Rep. 645; but that their power was not thereby determined; S. C. 2. Lev. 308. S. P.

2. Term Rep. 645. But the law of this case, and of all those in which it has been held that the umpire cannot make an award until the arbitrators time is expired, 1. Sid. 428. 454. Ray. 187. 2. Saund. 129. seems to have been denied in *Chace v. Dare*, T. Jones, 168. in which it is held, that an award by the umpire, though made before the arbitrators time is expired, shall be good, if the arbitrators make no award within the time allowed them by the submission. See a Treatise on the Law of Awards, by Mr. Kyd, p. 47. to 56.

\* The King *against* the Bishop of Worcester, Jervason, Case 27.  
and Hinkley.

Trinity Term, 21. Car. 2. Roll 1714.

[THE KING COUNTS, That *Queen Elizabeth* was seised of the advowson of the church of *Norfeld*, with the chapel of *Coston* in gross, in fee, *in jure coronæ*, and presented one *James White* her clerk, who was admitted, instituted, and inducted: that from the said queen the advowson of the said church, with the said chapel, descended to *King James*, and from him to *King Charles the First*, and from him to *His Majesty* that now is; who being seised thereof, the said church, with the chapel, became void by the death of the said *James White*, and therefore it belongs of right to him to present: and that the defendants disturbed him, to his damage of two hundred pounds; which the said attorney is ready to verify for

THE KING.

The defendants plead severally.—And first *The Bishop* says, That he claims nothing in the said church, and the advowson, but as ordinary.—The defendant *Jervason* saith, That long before the said presentation supposed to be made by the late queen, one *Richard Jervason, esq.* was seised of the manor of *Norfeld*, with the appurtenances, *in com. prædicto*, to which the advowson *ecclesiæ prædictæ tunc pertinuit, et adhuc pertinet*, in his demesne as of fee; and, so seised, the said church became void by the death of one *Henry Squire*, then last incumbent of the said church, and so continued for two years, whereby the said late queen, *prætextu lapsus temporis*, in default of the patron, ordinary, and metropolitan, *ecclesiæ prædictæ pro tempore existentis dictæ nuper reginæ devolutæ* by her prerogative; and afterward, that is, *tertio die Decembris, 28. Eliz.* by her letters patents under the great-seal, bearing date the said year and day at *Westminster*, to the said church, then being void, presented the said *James White*, who was admitted, instituted, and inducted, *tempore pacis, &c.*: That the said *James White* being so rector of the said church, and the said *Richard Jervason* seised of the said manor to which the said advowson pertained, &c. the said *Richard* after, at *Norfeld* aforesaid, died so seised; after whose death, the same descended to one *Thomas Jervason, esq.* as son and heir of *Richard*, and from him descended to one *Sir Thomas Jervason, knt.* who entered, and was seised: and, so seised, the said *Sir Thomas Jervason, March 30th, 14. Car. 1.* by his deed in writing, sealed at *Norfeld* aforesaid, granted to one *Phineas White* the advowson of the said church, for the first and next avoidance only, whereby the said *Phineas* was possessed for the next avoidance of the said advowson; and, so possessed, the said church became void by the death of the said *James White*, which was the first and next avoidance after the said grant to *Phineas*: That *Phineas*, by virtue of his said grant, presented one *Timothy White* his clerk, who was thereupon admitted, instituted, and inducted, *tempore pacis tempore Car. 1.*: That the said *Timothy* being rector, and the said *Sir Thomas Jervason* seised as aforesaid, the said *Sir Thomas* died seised at *Nor-*

*In quare impedit*, if the king suggests title, and the defendant makes a title, and traverses the king's title, the king in his replication must maintain his own title suggested in the declaration; for it is not sufficient for him to traverse and destroy the title made by the defendant.

S. C. 2. Jones, 8.  
S. C. 1. Freeman, 7.  
S. C. Vaugh.

53.

Ante, 253.

8. Mod. 6. 105.

10. Mod. 123.

200. 245.

1. Stra. 266.

1. Ld. Ray.

211.

2. Ld. Ray.

1288.

3. Peer. Wms.

314.

4. Term Rep.

423.

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THE KING  
against  
THE BISHOP  
OF WORCES-  
TER, JERVA-  
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HINKLEY.

*field* aforesaid, and the said manor, with the appurtenances, descended to *Thomas* the defendant, as his son and heir; who entered, and was, and yet is seised; and being so seised, the said church became void by the death of the said *Timothy White*, and the said *Thomas Jervason*, the defendant, presented the other defendant, *John Hinkley*, who was admitted, instituted, and inducted, long before the writ purchased.—The defendant then traverses, ABSQUE HOC that the late queen was seised of the said advowson, with the chapel of *Coston* aforesaid in gross, and as of fee, *jure coronæ sue; et hoc paratus est verificare*; and demands judgment *si actio*.—*JOHN HINKLEY*, the incumbent, taking by protestation that the late queen was not seised, nor presented, as by the declaration is supposed; FOR PLEA SAITH, That *Richard Jervason* was seised of the manor of *Norfield*, with the appurtenances, *in com. prædicta*, and the advowson of the said church appertaining thereto; and pleads the same plea *verbatim*, as to the queen's presentation of *White* and all other things, as *Jervason* the plaintiff pleaded, and the presentation of himself; and that he was, by the presentation of the other defendant *Jervason*, admitted, instituted, and inducted into the said church, Sept. 15, 1660; and traverseth, ABSQUE HOC that the king was seised of the said advowson and chapel in gross, as of fee; *et hoc paratus est verificare*; and demands judgment.

THE ATTORNEY GENERAL replies: and as to the bishop claiming nothing but as ordinary, demands judgment, and a writ to the said bishop; and hath it with a *cesset executio*, until the plea determined between the king and the other defendants. And as to the plea of the said *Thomas Jervason* the patron, THE ATTORNEY maintains the seisin of the late *Queen*, and of *King James*, *King Charles the First*, and of the *King* that now is, of the said advowson of the said church and chapel, as by the count before is declared; and that the said *Phineas White*, of his own wrong, by usurpation upon the late *King Charles the First*, to the said church, then void by the death of the said *James White*, presented the said *Timothy White*; and traverseth, ABSQUE HOC that the advowson of the said church was, or is, pertaining to the manor of *Norfield*; and demands judgment, and a writ to the bishop. And as to the plea of the incumbent, THE ATTORNEY replies as before to the patron's plea, That the late *Queen*, *King James*, *King Charles the First*, and the *King* that now is, were seised of the said advowson in gross, as of fee; and that the said *Phineas White* presented the said *Timothy*, by usurpation upon *King Charles the First*; and traverseth the appendancy of the advowson *ecclesiæ prædictæ* to the manor of *Norfield*.

THE PATRON *Jervason* rejoins, and demurs upon MR. ATTORNEY'S replication, as insufficient; and assigns for cause, That the attorney hath traversed matter not traversable, and that the traverse ought to have been omitted out of the replication; as also, that the said plea is repugnant in itself, and wants form. And *John Hinkley* the incumbent rejoins, That the said advowson is pertaining to the said manor, as he alledged in his plea before: *et de hoc ponit se super patriam*; and the attorney *similiter*.

VAUGHAN,

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VAUGHAN, *Chief Justice*.—FIRST, Upon this *quare impedit* brought, there is a good title to present surmised for the king, but no more; and there is much difference between a title *appearing* for the king and *supposed* only.—SECONDLY, The defendant, by his plea in bar, hath not well traversed the king's title; for it is traversed but in part; for only the seisin of the advowson in the queen is traversed, whereas properly the seisin and presentation of the queen, by reason of her seisin, ought to have been traversed by *absque hoc* that the queen was seised of the advowson in gross, and presented.—THIRDLY, The seisin of the advowson, which makes not a title alone, nor is either traversable or inquirable by the tender of a *demur mark* in the king's case in *droit d'advowson*, is not traversable neither alone in a *quare impedit*; but no demurrer being thereupon, nor any issue taken upon that traverse, no more shall be said of it.—FOURTHLY, The king may alledge seisin, without alledging any time (as *Sir Edward Coke* saith) in a *droit d'advowson*.—FIFTHLY, The defendant's traverse was not necessary, because he had confessed and avoided the queen's presentation by saying it was by lapse, if the defendant had rested upon avoiding the queen's presentation.—SIXTHLY, The attorney-general ought to have maintained his count, and traversed the queen's presentation by lapse.—SEVENTHLY, He doth not do so, but deserts making the king's title appear, and falls upon the plaintiff's title, that the advowson was not appendant.—EIGHTHLY, He offers a *double issue*, that the presentation of *Phineas White* was by usurpation, and the advowson not appendant to the manor.

THE KING  
against  
THE BISHOP  
OF WORCES-  
TER, JERVA-  
SON, AND  
HINKLEY.

Imperfections in  
the pleading.

Fitz. N. Br.  
f. 31. letter D.  
Littl. Coke,  
294. b.

26. Hen. 8.  
fo. 4. a.  
Hob. Digby  
and Fitzherb.  
f. 102. and  
Moore and  
Newman's Case,  
fo. 80. and 103.  
Ricc and Harri-  
son's Case,  
Yelverton,  
f. 211.

FIRST, If a man count or declare in a *quare impedit*, That he or his ancestors, or such from whom he claims, were seised of the advowson of the church, but declares of no presentation made by him or them, such count or declaration is not good; and the defendant may demur upon it: so is *Fitzherbert* expressly (a). "A man" says he, "shall not have a *quare impedit*, if he cannot alledge a presentation in himself, or in his ancestor, or in another person through whom he claims the advowson, and that in his count, unless it be in special cases:" and then he puts that special case; "as if a man at this day, by the king's licence, make a parochial church, or other chantry, which shall be presentable, &c, if he be disturbed to present to it, he shall have a *quare impedit*, without alledging any presentment in any person, and shall count upon the special matter." And the law in this, is the same in the case of the king with a common person, by all the Books, and precedents in the Books of Entry. To this add the *Lord Hobart's* judgment (b), which is always accurate for the true reason of the law. "Know that, though it be true that a presentation may make a fee without more," as a presentation by usurpation doth, "you never have a declaration in a *quare impedit*, that the plaintiff did present the last incumbent without more, but you declare that the plaintiff was seised in fee, and presented; or else lay the fee-simple in some other, and then bring down the advowson to the plaintiff, either in fee, or some other estate. The reason is, that the presentment alone is militant and indifferent, and may

(a) Fitzh. Nat.  
Br. f. 33. letter  
H.

(b) In the case  
of G. Digby v.  
Martha Fitz-  
herbert,  
Hob. Rep. 101,  
102.

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THE KING *against* " be in such a title as may prove that this new avoidance is the  
THE BISHOP " defendant's; and therefore you must lay the case so, that by the  
OR WORCES- " title you make the presentation past, joined to your title, to prove  
TER, JERVA- " that this presentation is likewise yours, as well as the last."  
SON, AND " Whence it follows, that a count of an estate and seisin without  
HINKLEY. a presentation, or of a presentation without an estate, are equally  
vicious and naught, be it in the case of *the king* or of *a common*  
*person*, and was never in example or precedent.

Hobart, f. 162. SECONDLY, A second necessary premise is this, and is both na-  
Colt and Glo- tural and manifest: When you will recover any thing from me, it  
ver's Case, *ad* is not enough for you to destroy my title, but you must prove your  
*summ paginæ.* own better than mine: for it is not rational to conclude, that you  
have no right to this, and therefore I have; for without a better  
right, *melior est conditio possidentis* is regular.

THIRDLY, "Every defendant," says Hobart, "may plead in a  
" *quare impedit* the general issue, which is '*ne disturba pas*,' be-  
" cause that plea doth but defend the wrong wherewith he stands  
" charged, and leaves the plaintiff's title not only uncontroverted,  
" but in effect confessed; and the plaintiff may, upon that plea,  
" presently pray a writ to the bishop, or, at his choice, maintain  
" the disturbance for damages." But if a man will leave the ge-  
neral issue, and controvert the plaintiff's title, he must then enable  
himself, by some title of his own, to do it. But yet that is not the  
principal part of his plea, but a formal inducement only; and there-  
fore there is no sense, if you will quarrel with my possession, and I, to  
avoid your title effectually, do induce that with a title of my own,  
that you shall fly upon my title, and forsake your own; for you  
must recover by your own strength, and not by my weakness. The  
Lord Hobart goes further, in giving the reason of this course of  
pleading, in *Colt v. Glover*, in the place before cited (a): "Of this  
(a) Hob. 162, " form of pleading in law, there is one reason common to other actions,  
163. " wherein title is contained to the land in question, *specially*; which  
" is, that the tenant shall never be received to counter-plead, but  
" he must make to himself, by his plea, a title to the land, and so  
" avoid the plaintiff's title alledged by traverse, or confessing and  
Rastal Ent. 1. " avoiding. But in the *quare impedit* there is a further reason of it,  
434. a. b. " for therein both plaintiff and defendant are actors one against  
" another; and therefore the defendant may have a writ to the bi-  
" shop as well as the plaintiff, which he cannot have without a title  
" appearing to the Court;" and so are the precedents, when a  
*quare impedit* is brought against the patron for disturbance of his  
clerk, not being in possession.

The case in brief, Upon the record, as it hath been opened, and the pleading therein  
and the question between the king and the patron, upon which all the question ariseth,  
upon it. I shall not make the question to be, Whether there may be a *traverse*  
taken upon a *traverse* (though that question be in truth in the case);  
for that is a question rather upon *terms of art*, than a *questio*  
*for.nsis*, and riling upon the naked facts of a case depending  
in judgment. I shall therefore make the question upon this  
case such as nakedly it is, without involving it in any difficulty  
of terms. The king brings a *quare impedit*, and declares, That  
Queen

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*Queen Elizabeth* was seised of the advowson of the church of *Norfield* in gross, as of fee, and presented, and derives the advowson to himself; and that the church became void by the death of the queen's presentee, and he is disturbed to present by the defendant *Jervason*. The defendant saith, That before the queen presented, *R. Jervason* his ancestor was seised in fee of the manor of *Norfield*, to which the advowson of this church is appendant: that it became void by the death of one *Squire*, and continued so for two years, and that the queen then presented *White* her clerk by lapse: that the manor and advowson descended from *Richard* to *Thomas Jervason*, from *Thomas* to *Sir Thomas Jervason*, who granted the next avoidance to *Phineas White*; who presented, upon the death of *James White*, one *Timothy White*, who was instituted and inducted, and then derives the manor and advowson to himself; and that the church becoming void upon the death of the said *Timothy*, he presented the other defendant *Hinkley*, and traverteth the queen's seisin of the advowson in gross.

THE KING  
against  
THE BISHOP OF  
WORCESTER,  
JERVASON,  
AND HINKLEY.

If a common person bring a *quare impedit*, and count his title to present, and that he is disturbed; the defendant, to counterplead the plaintiff's title, makes (as he must) a title to himself to present, and confesses and avoids, or traverses the plaintiff's title. FIRST, The plaintiff shall never desert his own title, and by falling upon, and controverting the weakness only of the defendant's title, recover or obtain a writ to the bishop, though the defendant's title do not appear to the Court to be sufficient, for the unanswerable reasons given by the *Lord Hobart* in the first place.—SECONDLY, If you will recover any thing from another man, it is not enough for you to destroy his title, but you must prove your own better than his.—THIRDLY, There is no sense, if you will quarrel with my possession or right, and I, to avoid your title effectually, either by traversing it, which is denying, or by confessing and avoiding it, do induce that with a title of mine own, that you shall fly upon my title to impeach it, and forsake your own, as I said before.—FOURTHLY, Though I should, being plaintiff, make it appear to the Court, that the defendant's title is not good, but no way make it appear that my own title is good, what inducement can the Court have to judge for me and against the defendant, when no more right appears for the one than the other; and not only so, but no right appears for either? In such case sure, *melior est conditio possidentis*: I ought not to be sued by him I have not wronged; and he who hath no right, can suffer no wrong.—FIFTHLY, It is to no end that the plaintiff should set forth any title at all, if he be not to make it good; for it would serve his turn only to impeach the defendant's title, and conclude thus unreasonably, that if I can make it appear the defendant hath not a good title, therefore I have and must have judgment for me. And where the king's title, in a *quare impedit* brought by him, appears to be no more than a bare suggestion, the king cannot any more than a common person (and for the same reasons) forsake his own title, and endeavour only the destroying of the defendant's title; for the weakening of the defendant's title without more, can no more make a good title to

The law in case of a common person.

How far in the king's case the law differs not from the case of a common person.

the

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against  
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the king, than it can to a common person. If the king, or his predecessor, hath presented by reason of wardship, of lapse, of the temporalities of a bishop in his hands, of outlawry, and in many other cases, when the church becomes void next after the ward's age and suing his livery, after the death of him presented by lapse, restitution of the temporalities, and reversal of the outlawry; in all these cases, if the king bring a *quare impedit*, and count that he was seised of the advowson in gross, and presented, and the true patron shall confess his presentation, and avoid it by shewing in these several cases that his presentation was in right of the ward, by lapse, by reason of outlawry, or of temporalities being in his hands, the king shall desert his own title, and controvert the defendant's respective titles in whose right he did formerly present, and if their title happen to appear not good, recover the second presentation, against those manifest rules of law delivered. If this should be law generally, then, though the king have no title to present, nor pretend to any (for it differs not, not to pretend at all, and not to be obliged to make good the title pretended) it were a more compendious way, when any patron presented, that the king should, by *scire facias*, compel him to set forth his title, and *demur* upon it, or *traverse* it, and recover the presentation, if the patron's title were any way defective. But it must be agreed there are cases in which the king may desert his own title, and not join issue upon the defendant's traversing the king's title, or avoiding it, but traverse the title made by the defendant in his bar, which is directly taking a traverse upon a traverse; which regularly a common person cannot do; nor I think in any case, but where the first traverse tendered by the defendant is not material to the action brought, as in the case of waste in the *Long Quinto* (a), the case of *Digby v. Fitzherbert* (b), and the case of *Woodroffe v. Cotford* (c). The king, counting of a title to himself by *office found*, or by other *matter of record*, which is another thing than only *surmising* a title, as in the case at bar, may chuse to maintain his own title found by office, and traversed by the defendant, or otherwise appearing of record, and take a traverse to the title made by the defendant. The reason is manifest; for the office of itself is a title appearing for the king, and he shall never lose his possession, having a title, but where the defendant's title doth appear a better. But what is this, that the king should relinquish his own title only surmised, and controvert the defendant's, whose title, though it should appear naught, leaves no title in the king, but that when an office is found, or a title for the king appears by other matter of *record*, if the defendant have no title, the king hath one by his office, or other record. Some books, *primâ facie*, seem to make for the opinion, that the king may generally desert his own title, and take a traverse to the defendant's. *Brook, tit. Prerogative, pl. 65.* "Where a man traverseth the office of the king, and makes to himself a title (*ut oportet*), traversing the title of the king contained in the office, the king may chuse to maintain his own title, or to traverse the title alledged; for the king is not bound to stand

In what the law differs in the king's case from the case of a common person.

- (a) 5. *Edw. 4.* in waste for cutting so many trees, and selling them, f. 100. b.
- (b) *Hob. 160.*
- (c) *Hob. 105.*

13. *Edw. 4.* f. 8. a.  
3. *Hen. 7. f. 3.* Stamford,  
"Prerogative," f. 64. b.

So is 13. *Ed. 4.* f. 8. and many other books.

Br. "Prerogative," pl. 65.  
7. *Edw. 6.*

"stand

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"stand to the first traverse which tenders an issue, but may traverse the matter of the plea of his adversary." For this no ancient book is cited. But *dicitur Hilar.* 7. *Edw.* 6. *quod sic utitur* in an information put by the subject for the king in the exchequer, "that where the defendant pleads a bar, and traverseth the information, the king may traverse the matter of the bar, if he will, and is not bound to maintain the matter contained in the *absque hoc*." This case, as appears in the first part of it, was in the case of an office, and therefore makes not at all against my diversity: in the latter part the assertion seems more general, as if the king could in any case desert to maintain the matter of his information, and traverse the bar of the defendant; but there is nothing in this part of the case positive enough to over-rule my difference, and is no more but "*sic utitur ut dicitur in scaccario*," which may be a mistaken report. The other case is likewise in *Brook*, but no ancient book-case cited, but only 38. *Hen.* 8. and no more. "An information in the *Chequer*: The defendant pleads, and traverseth a material point in the information, whereupon they are at issue; there the king cannot waive this issue, as he may in other cases, where the king alone is party, without an informer, *ut supra per attornatum regis, et alios legis peritos*." This case seems likewise to conclude, That when the information is only for the king, and a material point traversed, upon which issue is joined, that the king is not bound to that issue, but may take another. This disaffirms the former case, that when the information is by an informer, the king must maintain his information. Note the close of this case, "*ut supra per attornatum regis, et alios legis peritos*." I shall give the case here mentioned in this *ut supra*, which will, I think, determine the question, and clearly establish the law according to the difference taken. That case is likewise in *Brook*, and cited to be as in 34. *Hen.* 8. whereof there is no Year-Book, neither some four years before the last case I mentioned. It is thus: "*Nota by WHOREWOOD attornatum regis, et alios*, when an information is put into the *Chequer* upon a penal statute, and the defendant makes a bar, and traverseth, there the king cannot waive such issue tendered, and traverse the former matter of the plea, as he can upon traverse of an office, and the like, when the king is sole party, and entitled by matter of record; for upon the information there is no office found before, and also a subject is party with the king for a moiety, *quod nota bene*." Here it is most apparent, that upon an information, when the king hath no title by matter of record, as he hath upon office found, the king cannot waive the issue tendered upon the first traverse, though the information be in his own name; which disaffirms the second case in that point: and for the supernumerary reason, that the king is not the sole party in the information, it is but frivolous, and without weight; but the stress is, where the king is sole party, and entitled by matter of record. I shall add another authority out of *Stamford's Prerogative*. "If the king be once seised, his highness shall retain against all others who have not title, notwithstanding it be found also that the king had no title, but that the other had possession before him, as appeareth in 37. *Aff.* p. 35. which is pl. 11. where it was found, That neither the king nor the party had title,

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7. *Edw.* 6.

Br. "Travers  
"pur sans ceo,"  
P. 369.  
38. *Hen.* 8.

Br. "Preroga-  
"tive," p. 116.  
34. *Hen.* 8.

37. *Aff.* pl. 11.

"and

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Stamford.  
Prærogative,  
f. 62. b.

Stamford,  
Prærogative,  
f. 64. b.

13. Edw. 4. ex-  
pressly, and se-  
veral other  
books.

28. Hen. 6.  
f. 2. a.

"and yet adjudged that the king should retain; for the office that finds the king to have a right or title to enter, makes ever the king a good title, though the office be false, &c. and therefore no man shall traverse the office, unless he make himself a title; and if he cannot prove his title to be true, although he be able to prove his traverse to be true, yet this traverse will not serve him. It is to be noted, that the king hath a prerogative which a common person hath not; for his highness may chuse whether he will maintain the office, or traverse the title of the party, and so take traverse upon traverse. If the king take issue upon a traverse to an office, he cannot in another term change his issue, by traversing the defendant's title, for then he might do it infinitely. But the king may take issue, and after demur; or first demur, and after take issue; or he may vary his declaration: for in these cases, as to *the right*, all things remain, and are as they were at first; but this ought to be done in the same term, otherwise the king might change without limit, and tie the defendant to perpetual attendance.]"

WYLDE, *Justice*. I think the king cannot take the traverse in this case; and this will appear by looking into the old books, which were not well considered by those who did reply. It is said in the *Year Book* 13. Hen. 7. 13, 14. pl. 18. that the king may chuse, either to maintain his own title, or to traverse the title of the party who sues him by petition: so in the 13. Edw. 4. 8. pl. 1. it is said, that when one traverses an office, the king may either maintain the office, or traverse the title shewn for the party, because no man shall recover lands against the king without having a title. But there it is resolved, That if the king join issue upon his own title, he cannot change issue, and traverse the title shewed for the party. Now here is the allegation of the king, that the advowson was in gross, and the defendants denying it, is in nature of joining an issue, which cannot be receded from. But the reason why in that case the king might waive the traverse tendered to his title, and traverse the title shewn for the party, is, because the office puts the king in actual possession; for where the king is in by *record*, or *possession* (for possession is enough), the party must make a title, if he will recover against the king, as in *Savage's Case* (a). It was found by inquisition, that whereas THE TURN, time out of mind, used to be held at *Worcester*, he, being sheriff for life, held it at *Pedyl* and *Streight*, *contra formam statuti de MAGNA CHARTA*: upon a *scire facias* upon an information hereupon, for forfeiting the office, he pleads, That time out of mind, &c. it used to be held \* at *Pedyl*, &c. ABSQUE HOC that it used to be held at *Worcester*: Resolved, that the king might maintain the inquisition, that it used to be held at *Worcester*, ABSQUE HOC that it used to be held at *Pedyl*, &c. and the reason is, because the king was intitled to the forfeiture by a record. The difference is, Where the king is actor, as here he is, being out of possession,

\* [ 277 ]

(a) Keil. 192. pl. 3.

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he must make a title, and prove it. But where the party is actor, he cannot fix upon his own title, and force the king to make good his own title: 34. Hen. 8. Br. Prerog. 116. *Whorewood's Case* is full in point. In an information *tam quam*, if the defendant traverse, the king cannot waive the issue so tendered. One reason indeed given is, because the king is not sole party; but the chief reason is, because the king is not intitled by matter of record: for saith the book, 'There is no office found before the information; but upon a traverse of an office, *et hujusmodi*, saith the book, the king may do it, because he is intitled by matter of record; therefore, in our case, the king shall not waive the issue tendered, &c. and fly upon the matter of the defendant's title.

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ARCHER, *Justice, accordant* It must be admitted, that in this case the king must make a title, because by presenting of *Tim. White* and also of *Hinkley* the defendant, the which was nine years since, he is put to his *quare impedit*, and is out of possession, I do not say of the inheritance, though that hath been a question in the old books (a). But it has been adjudged, that the inheritance cannot be gained or devested out of the king by any usurpations (b); but that he may grant away the inheritance of the advowsons still, &c. But it is as clear, and agreed by all those books, and by *Boswell's Case* (c), that in such case, he must bring a *quare impedit* to recover the presentation, for he is put out of possession of that. For as LORD HOBART observes (d), it is one of the things whereupon usurpation works more violently than upon other possessions. Now he that is thus out of possession, and put to his *quare impedit*, must always make a title to himself in the declaration (e); and this the defendant cannot counterplead, but by conveying a title to himself, and so avoiding the plaintiff's alleged title, by traverse, or confessing and avoiding (f). Now here the defendant hath done what he could do; he hath traversed the king's title; why then \* shall the king depart from his own title, and fly upon the defective title of the defendant? No; *Actori incumbit onus*; he must recover by his own strength, not by the defendant's weakness. The defendant, by traversing the king's title, has closed up the king, so as that he ought to take issue, and maintain his own title (g). I say therefore, that the king's declining his own title, and falling upon the other's, is a departure, which is matter of substance, and it would make pleading infinite: therefore the demurrer in this case is good. The case of *Chicheley v. Thompson* (h) is in point; and so is HOBART's opinion in *Digby v. Fitzherbert* (i); and though the Judges are two and two in that case, as it is there reported, yet the whole Court agreed it afterwards. So that were this a common person's case, I suppose it would be agreed on all hands. But it is insisted, that this is one of the king's prerogatives, That when his title is

\* [ 278 ]

(a) See Cro. Jac. 53.  
(b) Cro. Jac. 123. Cro. Eliz. 241.  
519. 6. Co. 30. and see 7. Ann. c. 19.  
Ante, page 256. notis.  
(c) 6. Co. 49, 50.  
(d) Hob. 322.

(e) Hob. 102.  
(f) Hob. 163.  
(g) Cro. Jac. 651.  
(h) Cro. Car. 105.  
(i) Hob. 103.

traversed

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traverfed by the party, he may either maintain his own title, againft the traverse of the party, or traverse the affirmative of the party (a). I answer, It is true, this is reckoned up among many other prerogatives of the king. But, FIRST, with reverence, feveral of them are judged no law; as that if the king have title by lapse, and he suffer another to present an incumbent, who dies, the king shall yet present, is counter-judged (b), and both that and the next following point too. SECONDLY, In the same case (c), there is a good rule given, which we may make use of in our case, viz. The common law doth so admeasure the king's title and prerogatives, as that they shall not take away, nor prejudice any man's inheritance (d). Now my brother WYLDE hath given the true answer, That when the king's title appears to the Court upon record, that record so intitles the king, that by his prerogative he may either defend his own, or fall upon the other's title: for in all cases where the king either by traverse (e), or otherwise, as by special demurrer (f), falls upon a defendant's title, it must be understood, that the king is intitled by record; and sometimes it is remembered, and mentioned in the case (i), that the king is in as by office, &c. But in *Brook "Prerog."* 116. the king's attorney doth confess the law to \* be so expressly, that the king has not this prerogative, but where he is entitled by matter of record. Before the 21. Jac. 1. c. 2. when the king's title was found by any inquisition, or presentment, by virtue of commissions to find out concealments, defective titles, &c. he exercised this prerogative of falling upon and traversing the parties titles, and much to the prejudice of the subjects, whose titles are often so ancient and obscure as they could not well be made out. Now that statute was made to cure this defect, and took away the severity of that prerogative; ordaining, That the king should not sue or impeach any person for his lands, &c. unless the king's titles had been duly in charge to that king or *Queen Elizabeth*, or had stood *in super* of record within thirty years before the beginning of that parliament, &c. *Hob.* 118, 9. The king takes issue upon the defendant's traverse of his title; and could the king do otherwise, the mischief would be very great, as my brother observed, both to the patron and incumbent. The law takes notice of this, and had a jealousy that false titles would be set on foot for the king: and therefore the statute 25. *Edw.* 3. st. 3. c. 7. and 13. *Rich.* 2. c. 1. and 4. *Hen.* 4. c. 22. enables the ordinary and incumbent to counterplead the king's title, and to defend, sue, and recover against it. But *à fortiori* at common law the patron, who by his endowment had this inheritance, might controvert and traverse the king's title; and it is unreasonable and mischievous, that the crown's possessions by lapse, or, it may be, the mere suggesting a title for the king, should put the patron to shew and maintain his title, when per-

(a) Pasch. Pr. C. 242. a.

(b) Cro. Car. 44. 7. Co. 28.

(c) 7. Co. 236.

(d) 19. *Edw.* 4. pl. 9. 11. *Hen.* 4. pl. 37. 13. *Edw.* 4. pl. 8. 28. *Hen.* 6.

pl. 2. 9. *Hen.* 4. pl. 6. F. N. B. 152.

(e) 24. *Edw.* 3. 30. pl. 27. *Kel.*

172. 192.

(f) *Fitz. Abr.* "Mon. de Fait," 173.

(g) *Fitz. Abr.* 34.

haps his title is very long, consisting of twenty mesne conveyances, and the king may traverse any one of them: *Keilway* 192. b. pl. 3. I conclude, I think the king ought to have taken issue, and he not doing it, the demurrer is good, and that the defendant ought to have judgment.

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TYRREL, *Justice, contra*. I am not satisfied but here is a *discontinuance*; for the defendant pleads the appendancy of the church only, not the chapel: it is true, he traverseth, that the queen was not seised of both. I deny what is affirmed, that the king by his presentation of *Timothy White*, and the present incumbent, is out of possession. By judgment of reversal the law at this day is (a), that he cannot be put out of possession of an \* advowson by twenty usurpations. A *quare impedit* is an action of possession; and if he were out of possession, how could he bring it? As to this traverse, it is a common erudition, that a party shall not depart, and that there shall not be a traverse upon a traverse (b). But the king is excepted; and it is agreed, that where the king is in possession, and where he is entitled by matter of record, he may take a traverse upon a traverse (c); and there is no book says, that where he is in by matter of fact, he cannot do it: indeed there is some kind of pregnancy at least in the last of those authorities (d); but I will cite two cases on which I will rely; viz. 19. *Edw. 3. Fitz. Monstr. de Faits*, 172. which is our case. The king in a *quare impedit* makes title by reason of a wardship, whereby he had the custody of the manor to which the advowson belonged, and that the father died seised thereof, &c.; and there is not a word that his title was by matter of record. The defendant pleads, that the father of the ward made a feoffment of the manor to him for life, and afterwards released all his right, &c. so that the father had nothing therein at the time of his death; and that after his death, he, the defendant, enfeoffed two men, &c. and took back an estate to him for ten years, which term yet continues, and so it belongs to him to present. But he did not shew the release, but demurred in judgment upon this, that he ought not to shew the release; and the king departs from his count, and insists upon that which the defendant had confessed, that he had made a feoffment; which he having not shewn by the release, as he ought to make himself more than tenant for life, was a forfeiture, and therefore the heir had cause to enter, and the king in his right; and thereupon prays judgment, and has a writ to the bishop (e). The other case is 24. *Edw. 3. 30. pl. 27.* which is our very case. The king brings a *quare impedit* for a church appendant to a manor as a guardian; the defendant makes a title, and traverseth the title alleged by the king in his count, viz. the appendancy; the king replies and traverses the defendant's title: for this cause the

\* [ 280 ]

(a) Cro. Jac. 123.

(b) See 1. Lev. 192, 193. 2. Lev. 112. 175. 1. Saund. 21, 22, 23.

1. Ld. Ray. 201. 211.

(c) 5. Co. 104. Plowd. 243. Br.

"Petition," 22. Br. "Prero." 56. 60. 69. 116.

(d) Br. "Prero." 116.

(e) 7. Co. 86. Co. Lit. 304.

defendant

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\* [ 281 ]  
(a) Staunforde  
Privilege  
Regis, 54.

Vough. 56, 57  
Yelv. 211.  
2. Mod. 185.  
2. Stra. 1012.

(b) But judgment was given for the defendant. See S. C. Vaugh. 53.

\* [ 282 ]  
Case 28.

An archdeacon  
cannot be ap-  
pointed by  
commissioners  
of sewers to the  
office of expen-  
ditor.

S. C. 1. Vent.  
105.  
1. Lev. 303.  
F. N. B. 175.

defendant demurs, and judgment was for the king. In this case it doth not appear in the pleading, that the king was in by matter of record, and so it is our very case: for the king may be in by possession by virtue of a wardship without matter of record by entry, &c (a). I rely \* upon these two cases. But 7. Hen. 8. *Keilw.* 175. is somewhat to the purpose. By FITZHERBERT: In a ravishment of ward by the king, if the defendant make a title and traverse the king's title, the king's attorney may maintain the king's title, and traverse the defendant's title. I think there is no difference between the king's being in possession by matter of record, and by matter of *fact*. Again, if matter of record be necessary, here is enough, viz. the queen's presentation under THE GREAT SEAL of England: and here is a descent, which is and must be *jure coronæ*. It is unreasonable that a subject should turn the king out of possession by him that hath no title. This is a prerogative case. As to the statutes objected by my brother ARCHER, they concern not this case. The first enables the patron to counterplead; but here the patron pleads. The rest concern the king's presenting *en auter droit*; but here it is in his *own right*. I think the king in our case may fly upon the defendant's title, and there is no inconvenience in it: for the king's title is not a bare suggestion; for it is confessed by the defendant, that the queen did present, but he alledges it was by lapse. For another reason I think judgment ought to be for the king, viz. Because the defendant has committed the first fault: for his bar is naught, in that he has traversed the queen's seisin in gross; whereas he ought to have traversed the queen's presentment *modo et formâ*. For where the title is by seisin in gross, it is repugnant to admit the presentment, and deny the seisin in gross; because the presentment makes it a seisin in gross: the Year Book of 10. Hen. 7. 27. pl. 7. is in point, and so is my *Lord Buckhurst's Case* in 1. Leon. 154. The traverse here is a matter of substance: but if it be but form, it is all one; for the king is not within the statute of 27. Eliz. c. 5.—So he concluded that judgment ought to be given for the king (b).

\* Doctor Lee's Case.

RAYMOND moved for a writ of privilege to be discharged from the office of *expenditor*, to which he was elected and appointed by the commissioners of sewers, in some part of Kent, in respect of some lands he had within the Level. He insisted that Doctor Lee was an ecclesiastical person, archdeacon of Rochester, where his constant attendance is required; adding, that the office to which he was appointed was but a mean office, being in the nature of that of a bailiff, to receive and pay some small sums of money;

2. Inst. 4. Co. Lit. 99. 6. Mod. 140. 1. Stra. 87. 698. 2. Stra. 1107.

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money; and that the lands in respect whereof he is elected were DOCTOR LEE'S CASE. let to a tenant.

It was objected against this, That this archdeacon's predecessors executed this office.

THE COURT ordered notice to be given; and granted a rule to shew cause why the Doctor should not execute this office.

Afterwards, RAINSFORD and MORTON, *Justices*, only being in court, it was ruled that he should be privileged, because he is a clergyman. But I think for another reason, *viz.* because the land is in lease, and the tenant, if any, ought to do the office.—The writ of privilege was accordingly allowed.

Lucy Lutterell, Widow, *against* George Reynell, Esq. Case 29.  
George Turberville, Esq. John Cory and Anne Cory.

THE PLAINTIFF, as administratrix to *Jane Lutterell* during the minority of *Alexander Lutterell*, the plaintiff's second son, declared against the defendants in an action of *trespass*, For that they, together with *John Chappell, &c.* did take away four thousand pounds of the monies numbered of the said *Jane*, upon the 20th day of *October* 1680; and so for seven days following the like sums, *ad damnum* of thirty-two thousand pounds. \* Upon a full hearing of witnesses on both sides, the jury found two of the defendants guilty, and gave six thousand pounds damages; and the others not guilty. A new trial was afterwards moved for, and denied. MR. ATTORNEY GENERAL at the trial excepted against the evidence, That if it were true, it destroyed the plaintiff's action, inasmuch as it amounted to prove the defendants guilty of *felony*; and that the law will not suffer a man to smother a felony, and bring trespass for that which is a kind of robbery. "Indeed, said he, if they had been acquitted or found *guilty* of the felony, the action would lie. Therefore it may be maintained against *Mrs. Cory*, and against *William Maynard*, "who were acquitted upon an indictment of felony for this matter; but not against the rest."—But THE LORD CHIEF BARON declared, and it was agreed, that it should not lie in the mouth of the party to say that he himself was a thief, and therefore not guilty of the trespass: but perhaps if it had appeared upon the declaration, the defendant ought to have been discharged of the trespass. *Sed quare*, What the law would be, if it appeared upon the pleading, or were found by special verdict?

Trespass will not lie for taking money, if it appear, either on the evidence, or in the pleading, on the part of the plaintiff to be felony; except the party has been prosecuted for the crime, but the defendant cannot shew the felony in bar of the trespass.

\* [ 283 ]  
2. Roll. Abr. 557.  
Jones, 148.  
Litch. 145.  
12. Mod. 339.  
2. Ld. Ray. 981.

MY LORD CHIEF BARON also declared that it was agreed, That whereas *William Maynard*, one of the witnesses for the plaintiff, was guilty, as appeared by his own evidence, together with the defendants, but was left out of the declaration, that he might be a witness for the plaintiff, that he was a good and legal witness; but his credit was lessened by it, for that he swore in his own dis-

In trespass, if the fact appear on trial to have been felony, a person, though proved by his own testimony to be a parti-

cipal criminis, is a competent witness charge;

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**LUTTERELL** charge; for that when these defendants should be convicted, and have satisfied the condemnation, he might plead the same in bar of an action brought against himself. But those in the *simul cum* **REYNELL** *against* were no witnesses (a).

(a) *A. wins*

money of *B.* by means of *C.* and *D.* packing the cards: upon an indictment against *C.* and *D.* *A.* cannot be a witness, because *interested* in the conviction; for it might give the record of it in evidence on a prosecution against him as a *particeps criminis*. By *LER*, Chief Justice, at the sittings after Mich. Term, 15. Geo. 2. in the case of *Rex v. Backwell, Merrill, and Others*. *Note to the Fourth Edition*.—See also 8. Mod. 60. 10. Mod. 193. 12. Mod. 72. 520. Stra. 633. 2. Ld. Ray. 1007. 1411. Cases in Crown Law, 2d edit. 141. 365.

*Hearsay*, though not direct evidence, is admissible in corroboration of a witness's testimony.

Skin. 402.

Holt, 286. Bull. N. P. 274. Gilb. Evid. 4th edit. 150.

\* [ 284 ]

Depositions in chancery may be read in evidence on a trial at law, if the deponent is disabled by *sickness* to attend.

Several witnesses were received, and allowed, to prove, That *William Maynard* did at several times discourse and declare the same things, and to the like purpose, that he testified now. And the LORD CHIEF BARON said, though a *hearsay* was not to be allowed as a direct evidence, yet it might be made use of to this purpose, *viz.* to prove that *William Maynard* was constant to himself, whereby his testimony was corroborated.

10. Mod. 210. 225. 262. 12. Mod. 215. 231. 305. 317. 339. 375. 493. 607. Fitzg. 197. 1. Peer. Wms. 283. 414. 557. 2. Peer. Wms. 563. 1. Ld. Ray. 729. 2. Ld. Ray. 873. 1166. 1371. 1. Vern. 331. 413. Prec. Chan. 64. Abr. Eq. 227. 2. Stra. 920. The like point in *Mr. Fitzgerald's Case*, in chancery, Trinity Term, the 15. & 16. Geo. 2. where the witnesses were gone abroad. And see Gilbert's Law of Evidence, 4th edit. 60.

### Case 30.

### Smith against Smith.

If one of two executors receive the whole of the testator's effects, and the other sues for the recovery of his moiety, an *assumpsit*, on a promise to pay him so much, in consideration he will *forbear*, and shew him an account, is good after verdict, al-

**ASSUMPSIT.** The plaintiff declared, Whereas he and the defendant were executors of the last will and testament of *J. S.*; and whereas the defendant had received so much of the money which was the testator's, a moiety whereof belonged to the plaintiff; and whereas the plaintiff *pro recuperatione inde se et affet* the defendant; that he the said defendant, in consideration that the plaintiff *abstineret à se et à præd. prosequendâ et monstraret quoddam computum*, did promise him one hundred pounds; and avers, that he did forbear, &c.; *et quod ostentavit quoddam computum prædictum*.

*JONES*, after a verdict for the plaintiff, moved in arrest of judgment, *for the defendant*, as followeth: Although I do not see how that which one executor claims against another, is recoverable at all, unless in equity; yet I shall insist only on this, That here is though it is not stated in what court the suit was commenced.—S. C. 2. Keb. 695. 703. S. C. Ray. 203. Ante, 43. 166. 7. Mod. 13. 2. Saund. 136. 1. Salk. 25. 29.

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no good consideration alledged; for it is only alledged in general, that the plaintiff *scilicet*. It is not said so much as that it was *legali modo*, in a legal way, whereas it ought to set forth in what court it was, &c. that so the Court might know whether it were in a court which had jurisdiction therein or no; and so are all the precedents in actions concerning forbearance to sue. In point of evidence the first thing to be shewn in such case as this is, that there was a suit, &c.

SMITH  
again?  
SMITH.

SAUNDERS, *for the plaintiff*. That being the prime thing necessary to be proved, since the verdict is found for us, it must be intended to have been proved. But however, if this consideration be idle and void, yet the other maintains the action.

THE COURT agreed, That one good consideration was enough. IT WAS ALSO AGREED, That if the plaintiff had averred only that he had shewed *quoddam computum*, that unless the consideration had been to shew any account, it had been naught; for "*quoddam*" is "*aliud*." *Dyer* 70. *Num.* 38, 39. 1. *Hen.* 7. *pl.* 9. But it being "*quoddam \*computum præd.*" it was well enough; for "*computum prædictum*" refers it to the particular account discoursed of between them.—IT WAS ALSO AGREED, That it had been best to have said *monstravit* in the averment, that it might agree with the allegation of the consideration. But yet the word *ostentavit*, though it most commonly, by a *metonymy*, signifies "*to boast*," yet it signifies also "*to shew*," or "*to shew often*," as appears by all the Dictionaries; and therefore it is well enough.—Take judgment.

\* [ 285 ]

Sir Francis Duncombe's Case.

Case 31.

IT WAS HELD, That if a writ of error abate in parliament, or the like, and another writ of error be brought in the same court, it is no *superfedeas*. But if the first writ of error be in the exchequer chamber, &c. and then a writ be brought in parliament, &c. it is a *superfedeas* by the opinion of ALL THE JUDGES, against LORD COKE. *Vide Haydon v. Godsalve, Cro. Jac.* 241. 342.

In what case a writ of error shall be a *superfedeas*.  
S. C. 1. Vent. 100.  
Ante, 28. 106.  
112.

2. Roll. 492. Raym. 5. 1. Vent. 31. 1. Sid. 413. 2. Lev. 93. 3. Mod. 125. 2. Leon. 120. Bunb. 64. 131. See 3. Jac. 1. c. 8. Cro. Jac. 135. 2. Burr. 746. 13. Car. 2. c. 2. 16. & 17. Car. 2. c. 8. 1. Term Rep. 279. 3. Term Rep. 390.

Browne against London.

Case 32.

INDEBITATUS ASSUMPSIT for fifty-three pounds due to the plaintiff upon a bill of exchange drawn upon the defendant, and accepted by him, according to the custom of the merchants, &c.

An *indebitatus assumpsit* will not lie by an *indorsee* against the acceptor of a bill of exchange.

S. C. 2. Keb. 695. 713. 758. 822. S. C. 1. Lev. 298. S. C. 1. Vent. 152. S. C. 1. Freem. 14. Ante, 14. 2. Show. 5. Mod. 13. 367. 6. Mod. 129. 8. Mod. 373. 11. Mod. 100. 12. Mod. 37. 107. 345. 1. Salk. 125. 1. Ld. Ray. 175. 2. Ld. Ray. 753. 759. 1. Stra. 680. Gilb. Evidence, 4th edit. 110, 111.

U 2

After

## Michaelmas Term, 22. Car. 2. In B. R.

BROWNE  
against  
LONDON.

After a verdict for the plaintiff, it was moved in arrest of judgment, That though an *action upon the case* does well lie in such case, upon the custom of merchants, yet an *indebitatus assumpsit* may not be brought thereupon.

WINNINGTON. I think it doth well lie. Debt lies against a sheriff upon levying and receiving of money upon an execution: *Hob.* 206. Now this is upon a bill of exchange accepted, and also upon the defendant's having effects of the drawer in his hands, having received the value; for so it must be intended, because otherwise this general verdict could not be found.

\* [ 286 ]

\* RAINSFORD, *Chief Justice*. This is the very same with *Milton's Case*, lately in the court of exchequer, where it was adjudged, that an *indebitatus assumpsit* would not lie. In this case, he added, that the verdict would not help it; for though my LORD CHIEF BARON said it were well, if the law were otherwise; yet HE and WE all agreed that a bill of exchange accepted, &c. was indeed a good ground for a special action upon the case; but that it did not make a debt:—FIRST, Because the acceptance is but conditional on both sides. If the money be not received, it returns back upon the drawer of the bill; he remains liable still; and this is but collateral.—SECONDLY, Because the word "*onerabilis*" doth not imply debt.—THIRDLY, Because the case is *primæ impressionis*: there is no precedent for it.

OFFLEY, who was of counsel for the defendant in the case at bar, then said, that he was of counsel for the plaintiff in the exchequer case, and that therein direction was given to search for precedents; and that they did search in this court, and in *Guildhall*, and that there was a certificate from the attornies and prothonotaries there, that there was no precedent of such an action.—Adjournatur.

Vide 5. Co. 92,  
93.  
2. Roll. Rep.  
312.  
Godh. 28c.  
1. Bac. Abr.  
55, 56.

TWISDEN, *Justice*. I remember an action upon the case was brought, for that the defendant had taken away his goods, and hidden them in such secret places, that the plaintiff could not come at them to take them in execution; and adjudged it would not lie.

It seems, that neither *debt* nor *indebitatus assumpsit* will lie on a bill of exchange, except when there is a *privity* between the parties, as between the *payee* and the *drawer*, or the *drawer* and the *acceptor*; 1. Mod. Ent. 312. Kyd on Bills, 114.; and between the *indorsee* and his *immediate indorser*. Per LORD MANSFIELD, in *Keppel v. Tims*,

at N. P. Easter, 22. Geo. 3. Bailey, 47.; but there is no *privity* between the *indorsee* and the *acceptor*. Hard. 485. 1. Vent. 152. Comb. 204. The modern practice of proceeding on a bill of exchange is by special *action on the case*, founded on the custom of merchants. 1. Wilf. 185. 1. Ld. Ray. 21. Kyd on Bills, 115.

**ACTION** OF COVENANT brought by an *infant* by his *guardian*, For that the plaintiff being bound apprentice to the defendant by indenture, &c. the defendant did not keep, maintain, educate, and teach him in his trade of a draper as he ought, but turned him away. The defendant pleads, That he was a citizen and freeman of *Bristol*; and that at the general sessions of the peace there held, there was an order, that he should be discharged of the plaintiff, for his disorderly living, and beating his master and mistress; and that this order was enrolled by the clerk of the \*peace, as it ought to be, &c. To which plea the plaintiff demurred.

It was said for the plaintiff, That the statute of 5. *Eliz.* c. 4. doth not give the justices, &c. any power to discharge a master of his apprentice, in case the fault be in the apprentice, but only to minister due correction and punishment to him.

**THE COURT.** That hath been over-ruled here. The justices, &c. have the same power of discharging upon complaint of *the master*, as upon complaint of *the apprentice*: else the master would be in a most ill case who were troubled with a bad apprentice; for he could by no means get rid of him (*a*).

349. 441. 553. 1. Salk. 67. 1. Stra. 143. 704. 2. Ld. Ray. 1410.

**SECONDLY**, It was urged on the plaintiff's behalf, That he had not, for aught that appears, any *notice* or *summons* to come and make his defence; 11. *Co.* 99. *Bagg's Case*: and this very statute speaks of the appearance of the party, and the hearing the matter before the justices, &c.

**SAUNDERS**, for the defendant. In this case the justices are judges; and it being pleaded that such a judgment was given, that is enough, and it shall be intended all was regular,

1. Salk. 38. 2. Salk. 491. 1. Strange, 143. 1. Vent. 174. Scff. Caf. 113. pl. 723. and see Mr. Conft's edition of Bott's Poor Laws, vol. i. page 513. 520.

**TWISDEN** and **RAINSFORD**, *Justices*. That which we doubt is, Whether the defendant ought not to have gone to one justice, &c. first, as the statute directs, that he might take order and direction in it; and then, if he could not compound and agree it, he might have applied himself to the sessions. For the statute intended there should be, if possible, a composition in private; and the power of the sessions is conditional, viz. if the one justice cannot end it. In case of a bastard-child, they cannot go to the

(*a*) And now by 20. Geo. 2. c. 19. Bott's Poor Laws, vol. i. page 504. to f. 3. the same power is given to any two justices of the peace where the parties dwell. See Mr. Conft's edition of

The sessions, by the 5. *Eliz.* c. 4. may either punish an apprentice, or may discharge the indentures, whether the application be on the part of the master or the apprentice.

\* [ 287 ]  
S. C. 1. Vent. 174.  
S. C. 2. Keb. 696. 745. 751.  
760. 822. 872.  
Ante, 2.  
Cro. Car. 470. 530.  
1. Saund. 313.  
11. Mod. 204.  
12. Mod. 27. 83.

The sessions cannot exercise their authority between masters and servants, unless the party complained of be summoned to appear.  
Ante, 2.  
5. Mod. 139.  
Sett. & Rem.

These sessions have an original jurisdiction on the 5. *Eliz.* c. 4.

Michaelmas Term, 22. Car. 2. In B. R.

**WATKINS** sessions *per saltum*; and we doubt they cannot in this case. It is a  
*against* new case. And then the matter will be, Whether this ought to  
**EDWARDS.** be set down in the pleading?—*Adjournatur (a)*.

(a) But it seems to be now settled, a proportionable part of the apprentice-  
 that the sessions have an original jurif- for to be returned; *Hawkesworth v.*  
 diction upon this subject; *Rex v.* Hilary, ante, 2. *Rex v. Amies*, Const's  
*Johnston*, 3. Salk. 68. 1. Stra. 704. Bott, vol. i. p. 515. But the party com-  
*Rex v. Heafeman*, B. R. H. 101.; plained of must be summoned; *Rex v.*  
 and that they may discharge the parties Rutter, Const's Bott, vol. i. p. 513. and  
 from each other on *proper cause*; *Rex v.* *Rex v. Gill*, 1. Stra. 143. See also  
*Hales Owen*, 1. Stra. 99. 704. and order 20. Geo. 2. c. 19.

\* [ 288 ]

Cafe 34.

\* *Rex against* Ledginham.

*Easter Term*, 20. Car. 2. Roll 163.

An information does not lie against the lord of a manor for taking unreasonable distress; but the remedy is by action on the statute of *Marlebridge*.

**INFORMATION** setting forth, That he was lord of the manor of *Ottery St. Mary*, in the county of *Devon*, wherein there were many copyholders and freeholders, and that he was a man of an unquiet mind, and did make unreasonable distresses upon several of his tenants, and so was *communis oppressor et perturbator pacis*.

It was proved at the trial, that he had distrained four oxen for three-pence, and six cows for eight-pence, being amercements for not doing suits of court, and that he was *communis oppressor et perturbator pacis*.

The defendant was found guilty. But it was moved in arrest of judgment, That the information is ill laid :

S. C. ante, 71.  
 S. C. 2. Keb. 637. 607.  
 S. C. 1. Lev. 299.  
 S. C. Ray. 193.  
 205.  
 S. C. 1. Vent. 97. 104.  
 S. C. 2. Danv. 651.  
 S. C. Freem. 224.  
 Ante, 34. 1. Lev. 146. 3. Lev. 48. 2. Inst. 131. 107. 1. Hawk. P. C. 301. 2. Stra. 528.  
 10. Mod. 337.

FIRST, It is said he disquieted his tenants, and vexed them with unreasonable distresses. It is true, that is a fault, but not a fault punishable in this way; for by the statute of *Marlebridge*, c. 4. 2. *Inq.* 106, 7. he shall be punished by grievous amercements; and where the statute takes care for due punishment, that method must be observed.

An action for unreasonable distresses must shew how much, and of whom taken.—S. C. 1. Vent. 108. S. C. 2. Keb. 697.

SECONDLY, As to the matter itself, they do not set forth how much he did take, nor from whom; so that the Court cannot judge whether it is unreasonable or no, nor could we take issue upon them.

The charge of *communis oppressor* for is too general

THIRDLY, As to the *communis oppressor et perturbator pacis*, they are so general, that no indictment will lie upon them; as in *Cornwall's Case (a)*, which indeed goeth to both the last points.

2. Roll. Abr. 79. 6. Mod. 311. Moor, 302. 2. Hawk. P. C. 322. Burr. Rep. 2471.

(a) Jones, 392.

TWISDEN,

Michaelmas Term, 22. Car. 2. In B. R.

TWISDEN, *Justice*. *Communis oppressor, &c.* is not good: such general words will never make good an indictment, save only in that known case of a *barrator*; for "*communis barrator*" is a term which the law takes notice of, and understands: it is as much, as I have heard judges say, as "a common knave," which contains all knavery. For the other point, an *information* will not lie for taking outrageous distresses. It is a private thing, for the which the statute gives a remedy, *viz.* by an *action* upon the statute *tam quam*.

Rex  
against  
LIDGINHAM,

PER CURIAM. It is naught.—*Adjournatur* (a).

(a) The Court were unanimously of opinion, that the charge of *communis oppressor et perturbator pacis* is too general; S. C. 2. Keb. 697. S. C. 1. Lev. 299.; and that in proceedings for this injury it ought to be stated upon what tenants the distress was made, with their names, and how much was taken; S. C. 1. Vent. 108.: but the judgment was arrested, because an information will not lie for taking an *excessive distress*;

for that the remedy is by special action on the statute of *Marlebridge*. S. C. 1. Lev. 299. S. C. Ray. 205.—*TRESPASS vi et armis* will not lie for this injury at common law; Fitzg. 85.; for the entry is at first lawful; 2. Strange, 851. And no subsequent irregularity in making distress for rent (and by 17. Geo. 2. c. 38. for the *poor's rate*) will make the party a trespasser *ab initio*. 11. Geo. 2. c. 19. Espinas. Dig. 56. 8.

\* [ 289 ]

\* Roberts against Marriot.

Cafe 35.

Trinity Term, 22. Car. 2. Roll 944.

AN ACTION OF DEBT brought upon a bond to submit to an award. The defendant pleads, *nullum fecerunt arbitrium*. The plaintiff replies, and sets forth an award made by two prebends of *Westminster*, and that it was delivered to the party according to the condition of the bond, &c. The defendant rejoins, that it was not delivered, &c.; *et hoc paratus est verificare*. The plaintiff demurs.

To debt on an award, if the defendant plead no award, and the plaintiff sets out the award; if the defendant rejoin, that "it was not delivered," and conclude with a verification, it is bad; for the rejoinder, which confesses an award, is a departure; and the affirmation that "it was not delivered" ought to have concluded to the country.

BALDWIN and WINNINGTON, *Serjeants*, argued for the defendant; and JONES for the plaintiff.

THE COURT. The defendant having first pleaded *nullum fecerunt arbitrium*, and then, in his rejoinder, that it was *not delivered* (which is a confession that there was an award made), has committed a *departure*; and so it has been judged. If he had pleaded *nullum fecerunt arbitrium, &c.* ABSQUE HOC that it was tendered, &c. it had been naught; and it is as bad now. ALSO when the plaintiff replies, that the award was delivered, and the defendant saith it was not, he should have concluded *to the country*, and not, as he doth *et hoc paratus est verificare*; for otherwise the party might go *in infinitum*, and there would be no end of pleading.

S. C. ante, 42.  
S. C. 2. Keb.

614. 618. 702. S. C. 2. Saund. 73. 188. S. C. 1. Lev. 306. Ante, 72. 227. 8. Co 133. 1. Saund. 102. 181. 10. Mod. 251. 257. 349. 12. Mod. 54. 92. 1. Ld. Ray. 30. 76. 234. 693. 2. Ld. Ray. 1449. Dougl. 58. 2. Term Rep. 459.

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**An award may be good in part.** NOTE, There was an exception taken to the award, viz. That it was awarded that there should be a release of all specialties among other things; whereas specialties were not submitted.—**THE COURT.** Then the award is void as to that only: but indeed, if the breach had been assigned in not releasing the specialties, it had been against the plaintiff. But now take judgment.

12. Mod. 534.  
2. Roll. Rep. 46.  
Cro. Eliz. 432.  
758.  
Cro. Jac. 584. 10. Mod. 201. See Kyd on Awards, 165. to 178.

### Cafe 36.

### Wood against Davies.

**Trover for "ricks of hay" is good after verdict.**

\* [ 290 ]

S. C. 1. Lev. 30.

S. C. 2. Keb. 703. Ante, 19. 46. 2. Stra. 738. 809. 1. Ld. Ray. 191.

**AN ACTION OF TROVER AND CONVERSION** was brought *de tribus struibus sceni, ANGLICE, "ricks of hay."* It was moved in arrest of judgment, That it was too uncertain; for no man could tell how much was meant by *strues*. It was urged it should have been so many cart-loads or the like; for loads was adjudged uncertain in *Glyn's* \* time here.—But **RAINSFORD** and **MORTON, Justices**, who only were in court, judged it well enough.

### Cafe 37:

### John Wootton against Penelope Hele.

*Michaelmas Term, 21. Car. 2. Roll 210.*

**If husband and wife levy a fine sur concessito A. for ninety-nine years, if he should so long live, with a general warranty against all persons during the said term, an action of covenant will, on the death of the husband, lie against the wife upon the warranty.**

S. C. ante, 66.

S. C. 2. Saund.

177.

S. C. 1. Lev.

301.

S. C. 1. Sid.

466.

S. C. 2. Keb. 684.

703. 709. 723.

S. C. 2. Danv. 50.

1. Roll. Rep. 352.

2. Roll. Rep. 63.

Godb. 276.

Poph. 136.

1. Bullst. 21.

3. Bullst. 163.

Cro. Jac. 240.

399. 521.

4. Co. 4.

2. Mod. 213.

3. Mod. 137.

10. Mod. 469.

476. 12. Mod. 444.

1. Lev. 301.

2. Lev. 37.

194. 3. Lev. 325.

1. Vent. 184.

2. Vent. 61.

Vaugh. 113.

Ray. 371.

1. Vern. 41.

2. Vern. 61.

3. Pocr. Wms. 189.

2. Saund. 180.

**COVENANT UPON A FINE.** The plaintiff declares, That whereas *quidem finis se levavit in curia nuper pretens. Custodum libertatis ANGLIÆ autoritate Parlamenti de Banco apud WESTMONAST. &c. à die Sancti Michaelis in unum mensem anno Domini 1649, coram OLIVERO ST. JOHN, JOHANNES PULISON, PETRO WARBURTON, et LEONARD ATKINS, Justic. &c. inter præd. JOHANNEM WOOTTON, &c. quer. et præd. JOHANNEM HELE et PENELOPEN HELE per nomina JOHANNIS HELE armigeri, et PENELOPES uxoris ejus, desorc. inter alia de uno messuagio, &c. Per quem finem præd. JOHANNES HELE et PENELOPE concesserunt præd. tenementa præd. JOHN WOOTTON habendum et tenendum, &c. pro termino 99 annorum proximorum post decessum GULIELMI WOOTTON, &c. si JOHANNES WOOTTON modo querens et GRACIA WOOTTON tandiu vixerint, aut eorum alter tandiu vixerit, et præd. J. HELE et PENELOPE et hæred. ipsius JOHANNIS warrant. præd. JO. WOOTTON prout per recordum finis præd. &c. plenius apparet. Virtute cujus quidem finis præd. J. WOOTTON fuit possessionat. de interesse præd. termini, &c. et sic inde possessionat. existens præd. GULIEL. WOOTTON, &c. postea, scil. sexto die, &c. obierunt, post quorum mortem*

*præd*

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*præd. J. WOOTTON in tenementa præd. &c. intravit et fuit inde possessionat. &c. et sic inde possessionat. existens præd. J. HELE postea, scil. &c. obiit et præd. PENELOPE ipsum supervixit. Et idem JOHANNES WOOTTON in facto dicit quod quidem HUGO STOWEL armiger, post commensationem termini præd. et durante termino illo et ante diem impetrationis hujus billæ, scil. &c. habens legale jus et titulum ad tenementa præd. &c. in et super possessionem termini præd. ipsius J. WOOTTON in eisdem intravit, ipsumq. J. WOOTTON contra voluntatem ipsius J. WOOTTON per debitum legis processum à possessione et occupatione tenementorum præd. ejecit expulit et amovit, ipsumq. J. WOOTTON sic inde expuls. à possessione suâ inde custodiuit et extratenuit \* et adhuc extratenet, contra formam et effectum finis et warrant. præd. Et sic idem præd. J. WOOTTON dicit quod præd. PENELOPE post mortem præd. J. WOOTTON licet sæpius requisit. &c. conventionem suam præd. warrant. præd. non tenuit sed infregit, sed J. HELE eidem WOOTTON tenere omnino recusavit et adhuc recusat, ad dam. &c. 600l. The defendant pleads, representando quod eadem PENELOPE conventionem suam warrant. præd. à tempore levationis finis præd. ex parte suâ custodiend. hujusq. bene et fideliter custodiuit, representandoq. quod præd. HUGO STOWEL præd. tempore intrationis ipsius HUGONIS in tenementa præd. non habuit aliquod legale jus aut titulum ad eadem tenementa, &c. pro placito eadem PENEL. dicit, quod præd. H. STOWEL ipsum JOHANNEM à possessione et occupatione tenementor. non ejecit expulit et amovit, prout præd. JOHANNES superius versus eam narravit; et hoc paratus est verificare.*

WOOTTON  
against  
HELE.

\* [ 291 ]

Upon this, *issue* was taken; and a verdict for the plaintiff was found; and three hundred pounds damages: and upon a motion in arrest of judgment, the cause was spoken to three or four times.

JONES, *for the defendant.* FIRST, It is considerable, whether an action will lie against a woman upon a covenant in a fine levied by her when *covert baron*. It would be inconvenient that land should be unalienable, and therefore the law enables a *feme covert* to levy a fine; which fine shall work by *estoppel*, and pass against her a good interest: but to make her liable to a personal action, thereupon to answer damages, &c. it were hard, and it is a case *primæ impressionis*.

*For the plaintiff*, it was said, There is little question but an action of covenant will well lie upon this warranty. The law enables a *feme covert* to corroborate the estate she passes, and to do all things incident: if she levy a fine of her inheritance she may be vouched, or a *warrantia chartæ*, &c. thereupon be had against her; and so is the case of *Roll v. Osborn*, *Hob. 20.* and if she can thus bind her land, à *fortiori* she may subject herself to a covenant, as in the case at the bar. If a husband and wife make a lease for years, and she accept the rent after his death, she shall be liable to a covenant.

Cowper, 201.

This

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WOOTTON  
against  
HALL.

\* [ 292 ]

In covenant on a  
general warrant  
against all  
persons during  
the term, a  
breach assigned  
what *A. habens  
legale jus et titu-  
lum* entered, &c.  
is not, tho'  
after verdict,  
sufficiently cer-  
tain, without  
shewing what  
title *A.* had.

Ante, 66. 101.

9. Co. 61.

Co. Ent. 117.

Dyer, 328.

Yelv. 227.

Cro. Eliz. 823.

914.

Cro. Jac. 312.

2. Vent. 252.

271.

4. Mod. 78.

3. Mod. 135.

2. Lev. 37.

1. Lev. 83. 301.

2. Vent. 62.

3. Lev. 325.

Dougl. 43.

3. Bac. Abr.

715.

1. Term Rep.

671.

3. Term Rep.

584.

This point was agreed by the counsel on both sides, That a covenant in this case would lie against her; and so THE COURT agreed. TWISDEN, *Justice*, added, that there was no question but a covenant would lie upon a fine; for (saith he) sealing is not always \* necessary to found an action of covenant. Thus covenant lies against the king's lessee by patent upon his covenant in the patent, though we know there is no sealing by the said lessee.

SECONDLY, It was urged on the defendant's behalf, That the breach of covenant is not well assigned, for it is not shewed what title *Stowel* had. It is not only participially expressed, "*habens legale, &c.*" but what is said is altogether general and uncertain; *jus et legalem titulum ad tenementa præd. (a)*: so that the breach assigned is in effect no more but that *Stowel* entered, and so the covenant was broken. If a man plead *Indemon. Conservat.* he must shew how. In the case of *Gyll v. Gless, Yelv. 227. Cro. Jac. 312.* debt for rent on a parol lease, the defendant pleads, that the plaintiff "*nil habuit in tenementis prædictis, unde dimissionem prædictam facere potuit.*" The plaintiff replies, "*quod habuit, &c.*" in general, without shewing in special what estate he had, that so it might appear to the Court, that he had sufficient in the lands whereout to make the lease; and therefore the replication was adjudged naught. It is true it was adjudged, that after the verdict it was helped by the statute of *Jeofails*; but that I conceive was, because the issue, though not very formal, yet was upon the main point, *viz.* Whether the lessor had an estate in the tenements or no? For the true reason why a verdict doth help in such a case is, because it is supposed that the matter left out was given in evidence, and that the Judges did direct accordingly; or else the verdict could not have been found. So in our case, if the issue had been, Whether *Stowel* had right, &c. it might have been supposed and intended by his special title and estate made out and proved by trial: but here the issue going off on a collateral point, it cannot be intended, that any such matter was given in evidence.

JONES and POLLEXFEN, *for the plaintiff.* This objection is against all the precedents, by which it appears, that alledging generally as we do, *habens legale jus et titulum*, is good. It is sufficient for a man to alledge, that the covenantor had no power to demise, or was not seised, &c. without shewing any cause why, or that any other person was seised, &c. 9. Co. 61. *Cro. Jac. 304. 369, 370.* It is to be enquired upon evidence, Whether the party had a good title or no?—And so THE COURT agreed.

\* [ 293 ]

In covenant on a  
general warrant  
for quiet en-  
joyment, the defect, in assigning a breach that *A. having lawful title entered, &c.* without shewing what title he had, is not cured by a verdict for the plaintiff, in an issue on a plea protesting that *A.* had not any lawful title, and affirming that he did not disturb the plaintiff.—Ante, 102.

\* THIRDLY,—SAUNDERS, *for the defendant*, Though the plaintiff was very wary, bringing in the right of *Stowel* with a *participle* joymment, the defect, in assigning a breach that *A. having lawful title entered, &c.* without shewing what title he had, is not cured by a verdict for the plaintiff, in an issue on a plea protesting that *A.* had not any lawful title, and affirming that he did not disturb the plaintiff.—Ante, 102.

3. Mod. 135.

3. Black. Com. 394.

1. Lev. 83.

2. Saund. 177.

3. Lev. 305.

Carth. 389.

Cro. Jac. 44.

5. Com. Dig. 44. 83.

1. H. El. Rep. 275.

1. Term Rep. 671.

(a) See *Lloyd v. Tomkins*, 1. Term Rep. 671.

only,

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only, so that we could not *take issue* upon it, we could only *protest*; yet I agree, that having taken issue upon one point, we must admit, and do admit the rest of the matter in the declaration: but that is only as it is alledged. Now here, therefore, we must admit, that *Stowel* had right and title, &c. but we do not admit that he had a title precedent to this fine, or had right otherwise than from and under the plaintiff himself; for that is not alledged. And it shall never be intended, no not after verdict, that *Stowel* had good and *eigne* right and title, before the lease granted by the fine; but the contrary shall be intended: and for that I rely upon the case of *Kirby v. Hansaker*, Cro. Jac. 315, by all the Judges of the common pleas and exchequer, in the exchequer-chamber, in point. Nay, that is a stronger case than ours is; for there the issue, which was found for the plaintiff, was, that the recovery by *Essex*, who answers to *Stowel* in our case, was not by covin, but by lawful title; and yet, because it was alledged that he had a good and *eigne* title, it was held to be ill, and not helped, and the judgment was reversed. They saying that *Stowel* ejected him, &c. "*contra formam et effectum finis et warrant. præd.*" or if it had been, "*contra formam et effectum conventionis præd.*" is absurd, and helps nothing; for *Stowel* could not do so, because he is not party to the fine.

WOOTTON  
against  
HALL.

JONES, for the plaintiff. It can never be intended that *Stowel* entered, &c. by a title under us, because it is alledged to be "*contra formam et effectum finis et warrant. præd. et contra voluntatem ipsius J. WOOTTON, et eum à possessione suâ custodivit, &c.*" Had it been by lease under us, the defendant should have pleaded it: I doubt whether the defendant could have demurred: but certainly now the jury have found all this, it can never be intended as they would have it. As to the case that has been cited between *Kirby v. Hansaker*; I say it is not alledged so clearly there, as here: It is not said there, that the lessee was possessed, and that the recoveror entered into and upon his possessions, and ejected him.—SECONDLY, These words "*contra formam, &c.*" are not in that case.—THIRDLY, In that case the court of king's bench was of opinion that the verdict had made it good.—FOURTHLY, The roll of that case is not to be found; here is a man \* will make oath that he hath searched four years before and after the time when the case is supposed to have been, and cannot find it.

\* [ 294 ]

RAINSFORD and MORTON, Justices, were at first of opinion that the verdict had helped it. For, saith RAINSFORD, If *Stowel* had title under the plaintiff, it could not have been found, that there was a breach of covenant. But afterwards they said, that the case of *Kirby v. Hansaker* came so close to it, that it was not to be avoided, and they were unwilling to make new precedents.

Cro. Jac. 315.

TWISDEN, Justice. That book is so expressed, that it is not an ordinary authority; it is not to be waived. But I was of the same opinion, before that book was cited. For here it is possible *Stowel* might have a lease from *Wootton* since the fine. Now the warranty doth not extend to *puisne titles*. The defendant should have said, that

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against  
HELL.

Cro. Jac. 315.  
2. Saund. 180.  
2. Ld. Ray.  
1228.

that *Stowel* had *priorem titulum*, &c. When a good title is not set forth in the declaration to entitle the plaintiff to his action, it shall never be helped. There was an action upon the statute of monopolies, for that the defendant entered, I suppose by pretext of some monopoly-commission, &c. *et detinuit* certain goods; but it was not said they were his, the plaintiff's; and though we had a verdict, yet we could never have judgment. In the case of *Cule v. Thorn* (a), an action brought upon a promise to give so much with a child, *quantum daret* to any other child, and it was alledged, that *dedit* so much; and because that it might be before the time of the promise, it was held naught after verdict. It may be the roll of *Kirby v. Hansaker* is not to be found, no more than the roll of *Middleton v. Clejman*, reported *Yel.* 65.; but certainly CROKE and YELVERTON, *Justices*, were men of that integrity, they would never have reported such cases, unless there had been such. There are many losses, miscarriages and mistakes of this kind. Pray, where will you find the roll of the decree for the titles in *London*? yet I have heard the Judges say, they verily believe it is upon a wrong roll.

THE COURT gave judgment, *nil capiat per billam*.

(a) Cro. Car. 186.

\* [ 295 ]  
Case 38.

\* The King against Neville.

Trinity Term, 22. Car. 2. Roll 9.

An indictment on a statute must pursue the material words of it.

S. C. 2. Keb.

693. 703. Stiles, 33. 1. Stra. 405. 12. Mod. 406. Dougl. 94.

INDICTMENT on the statute 31. *Eliz.* c. 10. (b) for erecting a cottage for habitation *contra formam statuti* was quashed, Because it was not said that any inhabited it; for else it is no offence. *Per* RAINSFORD and MORETON, *Justices*, *qui soli aderant*.

(b) Repealed by the 15. Geo. 3. c. 32. and see 4. Bl. Comm. 168.

Case 39.

Jemy against Norrice.

Trinity Term, 22. Car. 2. Roll 1220.

An assumption on a quantum meruit for "one pair of gloves" and "a parcel of thread," held sufficiently certain.

S. C. 2. Keb.

704. 715. S. C. 1. Lev. 303. S. C. 1. Vent. 105. Ante, 46. 294. 1. Lev. 301. Stiles, 36. 419. 2. Saund. 374. Comyns, 89. 6. Mod. 87. 12. Mod. 308. 511.

A WRIT OF ERROR was brought of a judgment given in the common pleas, in an action upon a *quantum meruit*, for wares sold.

FIRST, One of them is *unum par chirothecarum*; but it is not said of what sort.—TWISDEN, *Justice*. It is good enough, however; so it has been held *de coriis*, without saying *bovinis*, &c. *de libris*, without saying what books they were.

SECONDLY,

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SECONDLY, Another is *parcella fili*: which, it was said, was uncertain, unless it had been made certain by an *Anglicè*: for though it was agreed it had been good in an *indebitatus assumpsit*, yet in this case there must be a certainty of the debt. Such a general word cannot be good, no more than in a trover.—TWISDEN, *Justice*. If an *indebitatus assumpsit* should be brought for twenty pounds for wares sold, and no evidence should be given of an agreement for the certain price, I should direct it to be found specially (a). But "*parcella fili*" seems to be as uncertain as "pairs of hangings (b)."

JEMV  
against  
NORRICE.

THE COURT. It is doubtful; but, however, let the judgment be affirmed, *nisi, &c.*

(a) Russell v. Collins, ante, 8.

(b) Taylor v. Wills, ante, 46.

\* Foxwith and Others against Tremain.

\* [ 296 ]

Trinity Term, 21. Car. 2. Roll 1512.

Cafe 40.

FOR THE PLAINTIFF. The two parties, who are infants, may well sue by attorney, as they do. The authorities are clear, *Cotton v. Westcott* (a), *Powell v. Onslow* (b), *Weld v. Rumney* (c). We beg leave to mention especially what you MR. JUSTICE TWISDEN said there; though indeed we do not know, nor can be very confident that it is reported right. (TWISDEN. I do protest not one word of it true they went about.) But the case of *Bade v. Starkey* (d), and especially the *Countess of Rutland's Case* (e), is express in our point. In the alledgment of the case of *Bade v. Starkey*, by *Rolle* (f), there is indeed a *quære* made, because an infant might by this means be amerced. But that reason is a mistake; for it appears by *Dyer* 383. Co. Lit. 127. and 1. Roll. Abr. 214. that an infant shall not be amerced (g).

Several executors or administrators may sue by attorney, though some of them be infants; for all represent the person of the testator, and sue *en auter droit*; but if such executors or administrators be sued, the infants must defend by guardian.

MORETON, *Justice*. I take the law to be, that where an infant sues with others *en auter droit*, as here, he shall sue by attorney; for all of them together represent the testator. I ground myself upon the authorities which have been cited, and the case of *Smith v. Smith*, *Yelv.* 130. Also it is for the infant's advantage to sue by attorney. But if he be a defendant, he may appear by guardian. I think the parties may all join in this suit, though perhaps in the case of *Hatton v. Maskall* (h) they could not: for in that case it

S. C. ante, 47.  
72.  
S. C. 2. Keb.  
537. 625. 633.  
691. 698.  
S. C. Ray. 198.  
S. C. 1. Sid.  
449.  
S. C. 2. Saund.  
212.  
S. C. 1. Vent.

102. S. C. 1. Lev. 299. Yelv. 130. Hob. 72. 1. Leon. 74. 5. Co. 29. 6. Co. 67.  
1. Lev. 181. Fitzg. 1, 2. contra. 3. Mod. 25. 2. Stra. 784. 1076. 1. Ld. Ray. 232, 600.  
2. Ld. Ray. 1449. 2. Saund. 212.

(a) Cro. Jac. 420. 442. Poph. 130.  
1. Roll. Rep. 380.

(b) 1. Roll. Abr. 288. pl. 2.

(c) Styles, 328.

(d) Cro. Eliz. 541. Godb. 106.

(e) Cro. Eliz. 378. Owen, 156.

Moos, 266.

(f) 1. Roll. Abr. 288.

(g) See the argument at the bar for the defendant, post. 299.

(h) 1. Keb. 750. 2. Saund. 212.  
Ray. 198. 1. Lev. 181.

appeared

FOXWITH  
AND OTHERS  
against  
TREMAIN.

appeared that the wife only, who was plaintiff, was the executrix. So he concluded, that judgment ought to be given for the plaintiffs.

\* [ 297 ]

RAINSFORD, *Justice, accordant*. This case is stronger than where a single person is made executor or administrator. For though Rolle in his *Abridgement* makes a *quære* of the case of *Bade v. Starkey*, yet in abridging the case of *Holland v. Lee* (a), which is our case, he agrees clearly with the *Countess of Rutland's Case*, in *Cro. Eliz.* 377, that the infant, as well as the other executors, shall sue by attorney. The reasons objected on the contrary are, That an infant cannot make an attorney, and that he may be prejudiced hereby. I answer, That the executors of full age have influence upon the infants, and they are entrusted to order and manage the whole business; and therefore the administration *durante minore* shall not be granted: so in this case, he shall have privilege \* to sue by attorney, because he is accompanied with those which are of full age. I conclude, I have not heard of any authority against my opinion; and how we can go over all the authorities cited for it, I do not know.

TWISDEN *contra*. This is an action upon the case, For that the defendant was indebted for damages clearly received to the testator's wife; and indeed I do not see otherwise how it would lie. Two questions have been made: FIRST, Whether all the executors may, or must join? I confess I have heard nothing against this, *viz.* but that they may join. But I cannot so easily as my brothers slubber over all the authorities cited, especially the case of *Hatton v. Maskall*, which, I confess, is a full authority for this, that they need not join. The case was thus: The testator recovers a judgment, and dies, making his will thus: "Also, I devise the residue of my estate to my two daughters, and my wife, whom I make my executrix." I confess I cannot tell why, but the spiritual court did judge them all, both the two daughters as well as the wife, to be executrices; and therefore we the Judges must take them to be so. The wife alone proves the will, with a *reservata potestate* to the daughters, when they should come in. But this makes nothing at all in this case; I think this is according to their usual form. The wife alone sues a *scire facias* upon this judgment, and therein sets forth this whole matter, *viz.* That there were two other executrices, which were under seventeen, &c. It was adjudged for the plaintiff, and affirmed in a writ of error in the exchequer chamber, that the *scire facias* was well brought by her alone. But first, I cannot see how a writ of error should lie in that case in the exchequer chamber; for it is not a cause within 27. *Eliz.* c. 2. What reason is there for judgment? A reason may be given, That before an executor comes to seventeen, he is no executor. But I say he is *quoad esse*, though not

Ante, 79.  
Hob. 72.

(a) 1. Roll. Abr. 288. pl. 4.; and Rep. 73. 301. Bridg. 69. Moor f. e S. C. under the title of *Darcey v. Jackson*, Palm. 147. 224. 1. Roll. 622. Cro. Eliz. 77. 739.

*quoad*

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*pro ad executionem.* A wife administratrix under seventeen shall join with her husband in an action; and why shall not the infants as well in our case? The case of *Smith v. Smith*, *Yelv.* 130. is express, that the infant must join, and be named. It is clear, that no administration *durante minore ætate* can be committed in this case; for all the executors make but one person, and therefore why may not all join?—SECONDLY, Admitting they may join, Whether the infants may sue by attorney? I hold, that in no case an infant shall sue or be sued either in his own or *auter droit*, by attorney. \* There are but four ways by which any man can sue, in *propria personâ*, by attorney, by guardian, and by *prochein amy*. An infant cannot sue in *propria personâ*: That was adjudged in *Dawkes v. Peyton (a)*. It was an excellent case, and there were many notable points in it. *First*, It was resolved, That a writ of error might be brought in this court, upon an error in fact in the petty bag. *Secondly*, That the entry being general, "*venit tuch a one*," it shall be intended to be in *propria personâ*. *Thirdly*, That it was error for the infant, in that case, to appear otherwise than by a guardian. *Fourthly*, That the error was not helped by the statute of *Jeofails*. In a case between *Colt v. Sherwood*, in Michaelmas Term 1649, an infant administrator sued and appeared *per gardianum*; and it appeared upon the record, that he was above seventeen years of age. I was of counsel in it, and we insisted it was error; but it was adjudged, that he appeared as he ought to appear; and that he ought not to appear by attorney. And the reasons given were; *First*, Because an infant cannot make an attorney by reason of his inability. *Secondly*, Because by this means an infant might be amerced *pro falso clamore*. For when he appears by attorney, *non constat*, unless it happen to be especially set forth, that he is an infant, and so he is amerced at all adventures; and to relieve himself against this he has no remedy but by a writ of error. For error in fact cannot be assigned *ore tenus*. And it were well worth the cost to bring a writ of error to take off an amercement. But it is said, That the infants may appear by attorney in this case, because they are coupled and joined in company with those of full age. I think that makes no difference, for that reason would make such appearance good, in case that they were all defendants. But it is agreed, that if an infant be defendant with others who are of full age, he cannot appear by attorney. The reason is the same in both cases. If an infant and two men of full age join in a feoffment, and make a letter of attorney, &c. this is not good, nor can in any sort take away the imbecility which the law makes in an infant. I conclude, think the plaintiffs ought to join; but the infants ought to appear by guardian. But since my two brothers are of another mind, as to the last point, there must be judgment, that the defendant *espondeat ouster*.

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AND OTHERS  
against  
TREMAIN.

\* [ 298 ]

2. Saund. 222.

(a) Styles, 216. 218. 1. Roll. Abr. 747.

NOTE,

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AND OTHERS  
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TREMAIN.

\* NOTE.—COLEMAN argued *for the defendant*. His argument, which ought to have been inserted above, was to this effect: FIRST, These five cannot join. Had there been but one executor, and he under seventeen years, the administrator *durante minore ætate* ought to have brought the action: 5. Co 29. 2. But since there are several executors, and some of them of full age, there can be no administration *durante minore ætate*. Those of full age must administer for themselves, and the infants too. But the course is, that executors of full age prove the will, and the other, that is under age, shall not come in till his age of seventeen years. But now the question is, How this action should have been brought? I say, According to the precedent of *Hatton v. Mashall*, which was in the exchequer chamber, *Michaelmas Term, 15. Car. 2. Roll 703.* wherein the executor, who was of full age, brought the *scire facias*, but set forth, That there were other two executors who were under age, and therefore they who were of full age pray judgment; and it was resolved, the *scire facias* was well brought: and they agreed, That the case in *Yelv. 130.* was good law; because in that case it was not set forth specially in the declaration, that there was another executor under age. So that they resolved, That the executor of full age could not bring the action without naming the others.—SECONDLY; However, the infants ought to sue by guardian; and where *Rolle*, and other books say, that where some are of age and some under they may all sue by attorney, it is to be understood of such as are indeed under twenty-one, but above seventeen. *Respondeas ouster.*

Ante, 297.

After this the suit was compounded.

EASTER

# E A S T E R T E R M,

The Twenty-Second of Charles the Second, 2. Com. Dig.  
167.

I N

The Court of Chancery.

\* [ 300 ]

Charles Fry and Anne his Wife, against George Porter. Case 1.

**T**HE CASE WAS, MONTJOY EARL OF NEWPORT was seised of an house called *Newport-house*, &c. in the county of *Middlesex*, and had three sons, who were then living; and two daughters, viz. *Isabel* married to *The Earl of Banbury*, with her father's consent, who had issue *Anne*, the plaintiff; and *Anne* married to *Mr. Porter*, without her father's consent, who had issue *D*. Both these daughters died.

*The Earl of Newport* made his will in this manner: "I GIVE and bequeath to my dear wife the *Lady Anne, Countess of Newport*, all that my house called *Newport-house*, and all other my lands, &c. in the county of *Middlesex*, for her life. And after her death, I give and bequeath the premises to my grandchild *Anne Knollis*," viz. the plaintiff, "and to the heirs of her body: PROVIDED ALWAYS, and upon condition, that she marry with the consent of my said wife, and the *Earl of Warwick*, and the *Earl of Manchester*, or of the major part of them. And in case she marry without such consent, or happen to die without issue, then I give and bequeath it to *George Porter*," viz. the defendant.

THE EARL died. *Anne* the plaintiff married *Charles* the plaintiff, she being then about fourteen or fifteen years old, without the consent of either of the trustees.

therefore if *B*. marry without the consent of *D*. it is a determination of the estate-tail, and casts the possession upon *C*. by way of immediate remainder, although *B*. had no notice of this limitation previous to her marriage.—S. C. ante, 86. S. C. 1. Freem. 31. S. C. 1. Vent. 199. S. C. Ray. 236. S. C. 2. Lev. 21. S. C. 2. Keb. 756. 787. 814. 867. S. C. 3. Keb. 19. S. C. 1. Eq. Abr. 112. S. C. 1. Ch. Caf. 138. S. C. 2. Ch. Rep. 26. Gilb. Eq. Rep. 26. 147. 188. 11. Mod. 48. 12. Mod. 182. 2. Vern. 333. 580. 721. Prec. Chan. 565. Abr. Eq. 110. 282. 1. Peer. Wms. 284. 2. Peer. Wms. 419. (626). 628. Cases Temp. Talb. 164. 212. Comyns, 926. 757. 3. Peer. Wms. 65. 238. Lord Netterwil's Case, in the House of Lords, April, 1737. Ambler, 256. 259.

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And

*A*. had issue three sons and three daughters. The eldest daughter had issue *B*. The youngest daughter had issue *C*.—*A*. devises an estate to his wife for life, "and after her death to *B*. and the heirs of her body: provided always, and upon condition, that she marry with the consent of *D*.; and in case she marry without such consent, or die without issue, then I bequeath the said estate to *C*."—This is a limitation, and not a condition; and

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FRY AND HIS  
WIFE  
against  
PORTER.

\* [ 301 ]

And thereupon now a bill was preferred to be relieved against this condition and forfeiture, because she had \* no notice of this condition and limitation made to her, &c. To this the defendant had demurred, but that was over-ruled. Afterwards there were several depositions, &c. made and testified on each side, the effect of which was this.

On the plaintiff's part it was proved by several, that it was always THE EARL's intention, that the plaintiff should have this estate, and that they never heard of this purpose, to put any condition upon her; and believed that he did not intend to give away the inheritance from her; but that this clause in the will was only *in terrorem*, and cautionary, to make her the more obsequious to her grandmother. The two earls swore, that they had no notice of this clause in the will; but if they had, they think it possible such reason might have been offered, as might have induced them to give their consents to the marriage; and that now they do consent to, and approve of the same. Some proof was made, that the *Countess of Newport* had some design that the plaintiff should not have this estate, but that the defendant should have it. But at last even she (*viz.* the countess) was reconciled, and did declare, that she forgave the plaintiff's marriage, and that she shewed great affection to a child which the plaintiff had; and directed, that when she was dead, the plaintiff and her child should be let into the possession of the premises, and should enjoy them, &c. It was proved also, that when there had been a treaty concerning the marriage between my Lord *Morpeth* and the plaintiff, and the plaintiff would not marry him, her grandmother said, "she should marry whom she would, she " would take no further care about her." (The countess was dead at the time of this suit). It was proved, that *Mr. Fry* was of a good family, and that the defendant had five thousand pounds appointed and provided for him by his grandfather, by the same will.

\* [ 302 ]

On the defendant's part, it was sworn by the said late *Countess of Newport*, *viz.* in an answer made formerly to a bill brought against her by the now defendant for preserving of testimony (which was ordered to be read), that the marriage was private, and without her consent and approbation, and that she did not conceive it to be a fit and proportionable marriage, he being a younger brother, and having no estate. The like was sworn by the *Earl of Portland*, the said countess's then husband, and that it appeared she leaped over a wall (by means of a wheel-barrow set up against it) to go \* to be married; and that as soon as the trustees did know of the marriage they did disavow and dislike it, and so declared themselves several times, and said, That had they had any hint of it, they would have prevented it. Others swore that the *Earl of Portland* declared, upon the day of her going away, "that he never consented " thereto;" and that the countess desired then, that he would not do any thing like it; and that the *Earl of Warwick* said, he would have lost one of his arms rather than have consented to the said marriage.

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On hearing of this cause before the master of the rolls, viz. SIR HARBOTTLE GRIMSTONE, *Bart.* the plaintiff obtained a decretal order, (*viz.*) That *Anne*, the plaintiff, and her heirs should hold the premises quietly against the defendant and his heirs, and that there should be an injunction perpetual against the defendant, and all claiming under him.

Fry and his  
Wife  
against  
Porter.

And now there was an appeal thereupon, and re-hearing before SIR ORLANDO BRIDGMAN, *Knt.* then lord-keeper, assisted by the two lord chief justices, and the chief baron, before whom it was argued thus :

MAYNARD, *Serjeant.* The plaintiff ought not to have relief in this case. The plaintiff's mother had a sufficient provision by the *Earl of Newport's* care ; and therefore there is less reason that this estate should be added to the daughter. The noble lords the trustees, when the thing was fresh, did disapprove the marriage, however they may consent thereunto now. The devise was to the plaintiff, but in tail, and afterwards to the defendant. We disparage not *Mr. Fry* in blood, nor family ; but people do not marry for that only, but for recompence and like fortune. There was a public fame or report (it is to be presumed) of this will in the house ; and were there not, yet it was against her duty, and against nature, that she should decline asking her grandmother's consent ; and *Mr. Fry*, in honour and conscience, ought to have asked it : and therefore this practice ought not to receive the least encouragement in equity. It is true, when there was a demurrer, it was over-ruled, because the bill prayed to be relieved against a forfeiture, for which there might be good cause in equity. But now it does not appear there is any in the case. The \* estate is now [ 303 ] in the defendant, and that not by any act of his own, but by the deviser and the plaintiff. This is a *limitation*, not a *condition* ; for my *Lord Newport* had sons : it is somewhat of the same effect with a *condition*, though it is not so. We have a title by the will of the dead, and the act of the other party without fraud, or other act of us ; and therefore it ought not to be defeated. I take a difference between a devise of *land* and *money* ; for land is not originally devisable, though money is. By the civil law and amongst civil lawyers, it has been made a question, Whether there shall be relief against such a limitation in a devise ? But be that how it will, chattels are small things, but a freehold settled ought not to be devested thus : no man can make a limitation in his will better and stronger to disappoint his devise, conditionally, than this is made. If my *Lord Newport* had been alive, would he have liked such a practice upon his grand-daughter as want of notice ? In *Organ's Case (a)*, and *Sir Julius Caesar's Case (b)*, there was a grant to an infant on condition to pay ten shillings, and no notice given thereof before it was payable ; yet because

Note this  
distinction.

(a) *Organ v. Gardiner*, 1. Eq. Abr. 82. 1. Chan. Caf. 231.

(b) *Cæsar v. Cator*, Toth. 82.

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**FRY AND HIS WIFE** nobody was bound to give notice, it was adjudged against the infant.  
**against**  
**PORTER.**

**SIR HENEAGE FINCH, Solicitor General.** The witnesses who swear that the earl said, "he would give the estate to her," prove nothing to the purpose; for he did so but upon a condition, that they did not hear. The after consent of the earl, or the countess, ought not to make it good; which consent at last perhaps was extorted by importunity or compassion, for at first they disapproved of the marriage. Marrying without consent, and dying without issue, are coupled in the same line, and the estate shall as effectually pass over to the defendant upon the one limitation as the other. For such consent is matter *ex post facto*, and suspiciously to be scanned; for we ought in this case by law to proceed strictly, and not derogate from my *Lord Newport's* intent, which plainly appears by the letter of his will, that his grandchild should ask consent of such he had thereby appointed to consent before her marriage were solemnized, the actual solemnization of which was an act so permanent, that it would admit of no alteration or dissolution; an act of such force and efficacy, tending clearly and immediately to the ruin of their right and title to the estate in question, and \* rendering it wholly incapable of reviver by any other means than what the common and civil laws of this realm do permit. The post consent therefore will not avail the plaintiffs in this court: otherwise the defendant claiming by this limitation should have indeed advantage, but such as is inconsiderable, being liable to alteration by the pleasure of this court: and for a strict observation of the testator's words, the same ought to be in equity as well as at law. What great respect the old heathens paid to the wills of deceased persons may appear in these following verses:

*"Sed legem servanda fides, suprema voluntas,  
"Quod mandat, fierique jubet, parere necesse est."*

The countess saying, likely in passion, that "she might marry whom she would, &c." did not amount to a dormant warrant to her to marry without consent. I am upon conjecture still, that the plaintiffs will insist upon these particulars, for it looks as if they would, because they read them. Doubtless the primary intention of the clause was *in terrorem*; but the secondary was, that if she offended, she should undergo the penalty. His intention is to be gathered out of the words only, and whatever they say the Earl intended, does not press the question. Our freehold is settled in us by virtue of an act of parliament. I lay it down for a foundation, that a father may settle his estate so as that the issue shall be deprived of it for disobedience, and not be relivable in equity: and now it is not possible, that any counsel could advise a man to do it stronger than it is done in this case; and shall a child break these bonds, and look disobedience in the face here? If it had been only provided, that she should marry with the

Cro. Car. 476.

Post 694. 699.

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the consent, &c. and no further, it might have been somewhat; but since he goes on, and makes a limitation over, &c. he becomes his own chancellor, and upon this difference are all the precedents, and even those of devising portions, viz. devising them over or not, as I have understood. Infancy can be no excuse in case of the breach of a condition of an estate in which the infant is a purchaser: so that nothing rests now in this case but the point of notice. And why should not the infant be bound to take notice in this case, as he is to take notice in case of a remainder wherein he is a purchaser? But if notice \* be necessary, it is not to be tried here now. If we had brought an ejectment, and (supposing notice had been necessary) we had failed in the proof thereof, should we have been barred for ever, as by this perpetual injunction we should be? And shall it be done now without proof? If we are not bound to prove notice at law, much less are we bound to prove it here. This case is epidemical, and concerns all the parents of England that have or shall have children, that the obligations which they lay upon their children may not be cancelled wholly, and this court (under colour of equity) protect them in it, and be a city of refuge for relief of such, the foulness of whose actions deny them a sanctuary.

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PECKE. If infancy would excuse, such a clause would signify nothing; for most persons, especially of that sex, marry before full age. The lords give no reason why they changed their opinions.

FOUNTAIN, *Serjeant*. The case of *Yelverton v. Yelverton* (a) is a precedent in the point for us, and *Shipdam's Case* (b) is much like it; this being of a devise of land, and that of money; which if it were paid, the land was to go over. The grand objection is, That here is an estate vested by a settlement, which is not to be avoided or defeated. But I doubt whether a man can lay such a restraint, that there shall not be relief in any case of emergency and contingency. It is a part of the fundamental justice of the nation, that men should not make limitations wholly unalterable; as by the common law men cannot make a fee unalienable. You give relief every day where there are express clauses, that there shall be no relief in law or equity; where a thing is appointed to be, &c. without relief in law or equity, you relieve against them, and look upon them to be void. In our case, suppose she had married a great lord, or suppose a person had brought notice of the trustees consent, Would you not have given relief? But secondly, I deny the assumption. This case is not so. I agree it had been well done if they had asked my *Lady Newport's* consent. But is there a word in the will, that if the plaintiff did not, he should have no relief in equity? The estate was devised to my *Lady Newport* during her life (so that the plaintiff could not be in pos-

See 3. Leon. 37.

(a) 2. Roll. Abr. 79. 790. Noy, 19. Moor. 342. 375. Cro. Eliz. 401.

(b) 1. Sid. 25.

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session), and she might have lived till the plaintiff was twenty-one years old. Could not my *Lady Newport* have said, "Have a care how you marry, \* for you forfeit the estate, if you marry without the consent of two of us three?" All ingredients and circumstances must be taken in a matter of equity. It is an argument to say, He has no estate, therefore take away his wife's estate, then there will be nothing to maintain her. It is agreed, That if the approbation had been precedent, it had been well. Now she had no notice, before the marriage, that it was necessary, and when she had that notice, she got the approbation; and that, though subsequent, is good enough, because it was asked (and gotten) as soon as she had notice that she ought to have it. The will is hereby sufficiently observed, for the intent of the will was, That she should have such a husband as those persons should approve, and this marriage is so approved. I rely upon this matter, but especially upon the word of notice.

ELLIS, *Serjeant*. There was a case of a *proviso* not to marry, but with the consent of certain persons first had in writing. Consent was had, but not in writing, and yet you ruled it good. Had this been a condition in law (as it is in fact), the law would have helped her. If the estate had been in her, there might have been some reason that she should have taken notice how it came to her; and of the limitation, &c. Had the earl been alive and consented to the marriage after it was solemnized, he would have continued his affection, and the plaintiffs have had the estate still. Why now, the consent of the lords and counsellors is as much as his consent: he had transferred his consent to them. This is a *ratio habita*, you cannot have a case of more circumstances of equity: FIRST, An infant. SECONDLY, No notice. THIRDLY, Consent after. FOURTHLY, Their declaration that they thought my Lord meant it *in terrorem*, &c. What if two of the trustees had died, should she never have married? Surely you would have relieved her.

BALDWIN, *Serjeant*. Here is as full a consent to the marriage, as could well be in this case. For since the plaintiff had no notice of the necessity of the earl's consent before the marriage, it had been the strangest and unexpectedest thing in the world, that she could have gone about to have asked it. The heir could not have taken notice of such a forfeiture; and why should a man that is named by way of remainder? In case of a personal legacy, this were a void proviso by the civil law; for I have informed myself of it. \* It is a maxim with them, "*Matrimonium esse liberum*." This amounts to as much as the condition, that the person should not marry at all. For when it is in the trustees power, they may propose the unagreeablest person in the world; it is a most unreasonable power, and not to be favoured. Sir *Thomas Grimes* settled his land so, that his son should pay portions; and if he did not, he demised the lands over; and it was adjudged relievable. If I limit, That my daughter shall marry

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marry with the consent of two, &c. if each of them have a design for a different friend, if you will not relieve, she can never marry. Is it not more probable, That if the earl had lived he would rather have given her a maintenance, than have concluded her under perpetual misfortune and disherison?

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KELYNGE, *Chief Justice*. I do not see how an averment or proof can be received to make out a man's intention against the words of the will. In *Vernon's Case* (a), though it were a case of as much equity as could be, it was denied to be received; and so in my *Lord Cheney's Case* (b). Here was a case of *Sir Thomas Hatton* (c), somewhat like this case, wherein no relief could be had.

4. Co. 4.  
5 Co. 68.  
Plow. 345.

VAUGHAN, *Chief Justice*. I wonder to hear of citing of precedents in matter of equity. For if there be equity in a case, that equity is an universal truth, and there can be no precedent in it. So that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself. And if the precedent be not the same case with this, it is not to be cited, being not to that purpose.

Co. Lit. 216.

BRIDGMAN, *Lord Keeper*. Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration, and weighing of the matter; and it would be very strange, and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.

Thereupon it was ordered, that they should be attended with precedents; and then, they said, they would give their opinions.

\* Three weeks after, they came into chancery again, and delivered their opinions *seriatim*, in this manner, *viz.* \* [ 308 ]

HALE, *Chief Baron*. The general question is, Whether this decree shall pass? I shall divide what I have to say into these three questions or particulars: FIRST, I shall consider, Whether this be a good condition or limitation, or conditional limitation? for so I had rather call it; it being a condition to determine the estate of the plaintiff, and a limitation to let in the defendant. I think it is good both in law and equity; and my reasons are, first, because it is a collateral condition to the land, and not against the nature of the estate, and she is not thereby bound from marriage.

SECONDLY, It obliged her to no more than her duty; she had no mother, and in case of marriage she ought to make application to her grandmother, who was *in loco parentis*; and since the estate moved from the grandfather, she was mistress of the disposition and manner of it. It is true, by the civil ecclesiastical law, regularly such a condition were void; and therefore, if the question were

(a) 4 Co. 1. Bend. 210. 3. Leon.  
22. Dyer, 317.

(b) 5. Co. 68. Moor, 727.

(c) *Hatton v. Gray*, 1. Eq. Abr. 21.  
2. Chan. Cases, 164.

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of a legacy, there might be a great deal of reason to question the validity of it, because in those courts wherein legacies are properly handled, it would have been void. But this is a case of land (devise). Indeed, it is agreed, that this is a good condition, and not to be avoided in itself.

THIRDLY, This being a good condition and limitation over, the question is, Whether there be relief against it in equity, admitting it were a wilful breach? I think there ought not to be any. I differ from the reasons pressed at the bar; as FIRST, That it was a devise by will, by virtue of the statute, &c. But that doth not stick with me; for if there may not be a relief against a breach of a condition in a will, there would be a great shatter and confusion in men's estates, and some of those settled by great advice, and there have been precedents of relief in such cases: *Fitz. v. Seymour* (a), and *Salmon v. Bernard* (b). SECONDLY, It has been urged, there could be no relief, because there is a limitation over. But that I shall not go upon neither. There have been many reliefs in such cases: I will decline the latitude of the objection, for that would go a great deal further than we are aware. But yet I think there ought to be no relief in this case. It is not like the case of payment \* of money, because there the party may be answered his debt with damages at another day; and so may be fully satisfied of all that is intended him. But here my FIRST REASON is, That it is a condition to contain the party in that due obedience which law and nature require. SECONDLY, It is a voluntary settlement to the grand-daughter in tail, and the remainder over is so too, and both these parties are in *æquali gradu* to the devisor; and therefore they being both in a parity, it would be hard to take the estate from him to whom and in whose scale the law hath thrown the advantage. THIRDLY, It appears by the body of the will, that the earl did as really intend it should go over, if she married without consent, as if she died without issue; for they are both in the same clause. There may be as much reason to turn it into a fee-simple, in case she had died without issue, as in this case; for so I doubt the penning of this decretal order does. And FOURTHLY, I rest upon this, It is a case without a precedent. I remember after that *Lanyett's Case* (c) had been adjudged, that in the sixth of *Charles the First* there was a case, I suppose *Saunders v. Cornish* (d), of a limitation in tail and a devise over, and it was adjudged void; and the Judges said, "So far it is gone, and we will go no further, because we do not know where it will rest." I know there is no intrinsic difference in cases by precedents, but there is a great difference in a case wherein a man is to make, and where a man sees (and is to follow) a precedent: In the one case a man is more strictly bound up, but in the other he may take a greater liberty and latitude. For if a man be in doubt, in *æquilibrio*, concerning a case, Whether it be equitable or no? in prudence he will determine according as

It was of a lease  
for years, and so  
was adjudged  
void.

Cro. Car. 230.

(a)

(b) 9. Co. fo. Cro. Jac. 304.

(c)

(d) Cro. Car. 230.

th:

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the precedents have been, especially if they have been made by men of good authority for learning, &c. and have been continued and pursued. Here must be some boundary, or we shall go we know not whither. It were hard a court of equity should do that which is not fit to be done in any court below a parliament. The precedents do not come home to the case. Most of them are in case of money legacies; and in some of those cases we may give allowance in respect of the law of another *forum* to which they belong. But this is in case of land only (a). Indeed he is no authority; but there is a very good exemplification of this matter.

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\* I shall consider the allays and circumstances which are observed, \* [ 310 ]  
and offer to qualify this case and induce relief.—FIRST, It is said, that this clause was only *in terrorem*, and some witnesses have been examined to prove it: but I am not satisfied how collateral averments can be admitted in this case; for then, How can there be any certainty? A WILL will be anything, everything, nothing. The statute appointed the will should be in writing, to make a certainty; and shall we admit collateral averments and proofs, and make it utterly uncertain?—SECONDLY, It is said in this case, the effect of the *proviso* has been obtained; for the trustees have now declared their consent. I must say, it is not full, for they do not say they would have consented; but that possibly such reasons might have been offered as they should have done it; and possibly, I say, not. They, like good men, have only declined the shewing an ineffectual contradicting of a thing which is done, and cannot now be recalled, undone, or altered. Besides, if there had been but a circumstantial variation, the consent afterwards might have been somewhat; but here it is in the very substance. In the case before cited at the bar by MR. SERJEANT ELLIS, where the consent was to be had *in writing*, and it was had only *by parol*, there was great equity that it should be relieved, because it was only a provident circumstance, and wisdom of the deviser, *viz.* for the more firm obliging the party to ask consent, which the deviser considered might be pretended to be had by slight words, in ordinary and not solemn communication, or else in passion and heat (as in this case, when the plaintiff would not consent to the approved marriage with the *Lord Morpeth*, the countess said, “ she might marry where she would:” which words imported a neglect of care for the future over the plaintiff, because she would not be ruled by the countess in accepting the tender of so commendable a marriage); as also for the benefit of the devisee (in the case aforesaid), that in case the devisee did marry with the consent of the trustee, he might not after (through prejudice, &c.) avoid it by denial of such consent, and so defeat or perplex the devisee for want of proof of such his consent.—THIRDLY, It is said the party is an infant. Why, an infant is bound by a condition in fact, by law. It is true, we are now in equity; but in

Cro. Jac. 145.

2. Vern. 561.

(a) 4. Co. 12.

equity,

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equity, since this refers to an act \* which she, though an infant, is capable of doing, viz. to marry; it were unreasonable that she should be able to do the act, and not be obliged by equity to observe the conditions and terms which concern and relate to that act: so that it is all one, as if she had been of full age. The statute of *Merton, cap. 5.* provides, That usury shall not run against infants; and yet the same statute *cap. 6.* appoints, That if an infant marry without the licence of his lord, &c. he shall forfeit double the value of his marriage: and it is reasonable, because marriage is an act which he may do by law while he is under age.

Notice.

Vide ante, 86,  
87, &c. 300,  
301, &c.  
Post, 312.

As to the point of notice: FIRST, Whether notice be requisite or no, in point of law, I will not determine. But I must needs say, that it must be referred to law. But, SECONDLY, If it be not requisite in law, how far a court of equity might relieve for want of it, I will not now take upon me to determine. I will not trench upon matters *gratis*, of which I know not what will be the consequence. But I conceive in this case, the fact is not yet settled, whether there were notice or not; and it were a hard matter, that because no notice is here proved, it should be taken for granted there was none. For here are several circumstances that seem to shew there might be notice: and a public voice in the house, or an accidental intimation, &c. may possibly be sufficient notice. I shall therefore leave it as a fit thing to be tried; and till that, the case in my understanding is not ripe; and therefore I will add no more. I think this decree ought to be altered, if not set aside. But as this case is, there ought to be no relief.

VAUGHAN, *Chief Justice.* I shall conclude as my lord chief baron did, That as this case is, there ought to be no relief. I will single out this case from several things not material to it, as my lord chief baron did, &c. I think, if land be devised on condition to pay legacies, and that the devisee has paid almost all, and fails in one, or so, there may be good cause of relief, because he has paid much, and is somewhat in the nature of a purchaser. This is not like a legacy; this is upon the statute, where it is said, "a man may devise at \* his will and pleasure," i. e. absolutely, upon condition, upon limitation, or any way that the law warrants. Suppose there had been a special act of parliament disposing as the earl has done, in this case could there be any colour in equity to alter or vary this law? And here it is equally as concluding as that, since the statute gives a man power to dispose as expressly; and otherwise equity would alter and dispose of all property, and all things that came in question. But let notice or consent, &c. be requisite, or not, it is triable at law. But I stand upon this, that there ought to be no relief in equity. It was insisted, that her grandmother gave a kind of consent: but I take that for nothing; for though the grandmother would not have offered or proposed a marriage, yet she ought not to marry without her consent. Nor is the lord's *post* consent any thing; for consent cannot be had for things which cannot be otherwise; as a man

cannot

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cannot be said to consent to his stature, or the colour of his hair, &c. A man may know of what opinion he is, or was; but it is impossible for a man to know of what opinion he would have been in the circumstances of an action which he never tried. I conclude, the plaintiffs ought not to have relief in equity. But if any matter in law will help them, they are not excluded from it.

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KELYNCE, *Chief Justice*. I think there ought to be no relief in this case. I have considered it as well as I can, and I think nothing is more fit to be observed than chief customary rules for children; they are very good restraints for children, and ought to be made good here, to encourage obedience, and discourage those who would make a prey of them; and if there were not hope for men to hasten their fortunes by this means, there would be few adventures of this nature. I have looked upon the precedents, &c. and I find they come not to this case, except only one, and that is but seven years old; and the others are for money, for which there is reason, because the party may be substantially relieved and satisfied otherways. If there had been no limitation over, there may be some reason why it may be intended, that it is only *in terrorem*. I do not think all cases upon wills are irremediable here (because of the statute). If the breach of the condition be in a circumstance only, as in the case where the consent was given, but not in writing, as it ought, it may be relieved; for that was a caution to the consentor, that he should not \* give consent before strangers, and trust to the swearing of a parol consent. I never yet saw any devise obliging to have any such consent after the party's age of twenty-one years, so that there is no great hardship in it. And if there should be any ill design in those who have the trust and power to consent in withholding their consent, it might be relieved here. I think none would make a decree, that if she died without issue, the defendant should have it; and this is the same: but equity can never go against the substantial part of a conveyance or will, but that must be governed by the party's agreement or appointment. Equity ought to arise upon some collateral or accidental emergent. It is not *in terrorem* indeed without a penalty. There can be no collateral averment. Being an infant is nothing: for this is only a provision while she is an infant. Besides, the case of the forfeiture of the double value is a very good instance for the notice. If she had notice of this will, yet they that came to steal her knew it not: for they did not come to take a shorn sheep, and therefore no relief is deserved by the plaintiff. In honesty and conscience those bonds ought to be kept strict. I confess, I would not have the plaintiff tempted to a further suit; but indeed in saying that I go further than I need.

\* [ 313 ]

BRIDGMAN, *Lord Keeper*. If I were of another opinion, yet I would be bound by my lords; for I did not send for them, not to be bound by them: but I was of their opinion from the beginning; and I am glad now that we are delivered from a common error, and that men may make such provisions as may bind their children. But to justify the decree a little: FIRST, Here are five thousand

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thousand pounds appointed to *George Porter*; so that ample provision was made him, and it may the rather be intended that this estate was wholly designed for the plaintiff.—SECONDLY, Here was a *post* consent, and those persons were *in loco parentum*. Now if the earl had, as possibly he might have, thus pardoned and been reconciled to the marriage, he would probably have given the plaintiff the estate, and that is a reason to induce us to the same; for I think it clear, that an estate by act of parliament is liable to the same relief, regulation, &c. as any other estate. An estate-tail, though that be by statute, yet is liable to be cut off, &c. If there had been a time limited, then there had been more reason to bind her up to have consent. \* But there ought to be a restraint put in these cases. That of the double forfeiture was truly and well observed: where nobody is bound to give notice, it is to be taken by the party; but besides, she is not heir; for that might have made a great difference. This I thought not to say. Upon the whole I am of opinion with my lords, and I am glad I have their assistance. Let the bill be dismissed,

\* [ 314 ]  
Ante, 86. 200.  
&c.

1. Lev. 48.

2. Lev. 21. 106.  
153.

3. Jones, 179.  
Cart. 170.

Nelf. Lutw. 56. 114. 135. 159. 249, 250.

See the case of *Scott v. Tyler*,  
2. Brown's Chan. Cases, page 431.  
and the cases there cited, where it was  
determined, upon full argument, that  
a condition annexed to a legacy, "that  
the legatee shall not marry without  
the consent of her mother," is a valid

condition; and that upon her marriage  
without such consent it shall go to the  
mother under a gift of a general residue.  
See also *Ambler's Rep.* 256. 259.  
*Comyns Rep.* 748. 2. *Vern.* 372.  
1. *Brown, C. C.* 303.

A

# T A B L E

OF THE

## P R I N C I P A L M A T T E R S,

CONTAINED IN THE

## F I R S T V O L U M E.

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### ANNUITY.

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ent of a particular Term, or at  
ne after, it may be entered up at  
me during the life of the attor-  
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f the warrant be general, and  
ent be not entered within *four*  
, permission must first be had from  
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oman being tenant in tail, with  
nder in fee to her sister, marries;

the husband and wife levy a fine to the  
use of themselves and the heirs of the  
body of the wife, with remainder in  
fee to the right heirs of the husband,  
with a *warranty* against them and the  
heirs of the wife: the husband, on the  
death of the wife without issue, may  
plead this *fine* and *warranty* in bar of  
the sister's remainder in fee; for the  
*warranty* being merely *nominal* as to  
the husband did not survive as to him,  
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ral heir to his wife, *Fowle v. Doble*,  
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he warranted, *ibid.* 183

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the death of the tenant for life, this  
*warranty descending* on the son will bar  
his entry as remainder-man in tail,  
notwithstanding the conveyance of the  
fine comes in by way of use; for  
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ranties* by tenant for life descending  
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1. If a man have a right of way through the house of another, he cannot use such way at unreasonable hours, nor bring an action for stopping it, without having previously requested and given notice to have it opened, *Tomlin v. Fuller*, 27
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